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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

CHRISTINE A. CRAFT,
Petitioner,

vs.

METROMEDIA, INC.,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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APPENDIX

Christine A. CRAFT,
Appellee/Cross-Appellant,

v.

METROMEDIA, INC.,
Appellant/Cross-Appellee.

Nos. 84-1336, 84-1380.

United States Court of Appeals,
Eighth Circuit.

Submitted Jan. 14, 1985.
Decided June 28, 1985.

Before LAY, Chief Judge, and McMILLIAN and JOHN R. GIBSON, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Christine Craft was reassigned from coanchor to reporter by KMBC-TV in Kansas City, Missouri, and as a result brought this action against the station's owner and operator, Metromedia, Inc. Craft alleged that she had been discriminated against on the basis of sex in violation of both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1982), and the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982), and that she had been fraudulently induced into accepting the KMBC employment. The primary focus of the suit was KMBC's concern with appearance—whether the station's standards for on-air personnel were stricter and more strictly enforced as to females than as to males and whether the station misrepresented to Craft its intentions as to changing her appearance to persuade her to accept the anchor job. The district court[1] found against Craft on her Title VII sex discrimination claim and refused a new trial as to the jury verdict against her on her equal pay claim. The court, however, set aside as excessive the jury verdict in Craft's favor on the fraud claim and ordered a new trial. *Craft v. Metromedia, Inc.*, 572 F.Supp. 868 (W.D. Mo.1983). Craft appeals from these rulings while Metromedia appeals from the judgment on the jury verdict,

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1. The Honorable Joseph E. Stevens, Jr., United States District Judge for the Eastern and Western Districts of Missouri.

again in Craft's favor, in the second fraud trial. We affirm the Title VII and Equal Pay Act judgments against Craft but further conclude that she did not make a submissible case on her fraud claim and thus reverse the judgment against Metromedia on that issue.

Christine Craft commenced her television career in mid-1975 as a weeknight weather reporter at a small station in Salinas, California. After about a year and a half, during which she also worked as an announcer, reporter, and substitute sportscaster, she became the weekend weather anchor at a San Francisco television station. She spent a year there, again handling some additional news and substitute sports assignments.

Craft then was hired by Columbia Broadcasting System to host the "Women in Sports" portion of its network television program "CBS Sports Spectacular." At the network's behest she had her hair cut short and bleached blond. She was required to use black eyebrow pencil and dark red lipstick, and a CBS technician applied heavy makeup before every on-air appearance. "Women in Sports" was discontinued after thirty weeks, and Craft returned to California.

About a year later Craft resumed her television career as a reporter at a station in Santa Barbara, California. She remained there, also serving as coanchor of the late news and occasionally doing sports and weather, until December 1980, when she began work at KMBC.

KMBC, having slipped in its local news ratings, had determined to adopt the coanchor format used by its two major competitors in Kansas City. Furthermore, it had determined that, because of the perceived "coldness" of its anchor, Scott Feldman, the new position was to be filled by a female to "soften" its news presentation. The

station obtained tapes of a number of performers, including Craft, from Media Associates of Dallas. After studying these tapes, KMBC news director Ridge Shannon contacted Craft, among other individuals, to see if she was interested in auditioning for the job. Craft described her unpleasant experience at CBS and made plain that she was not interested if KMBC intended a "makeover" of her appearance. She continued to stress this point while in Kansas City for the audition, and Shannon and R. Kent Replogle, vice president and general manager of KMBC, assured her they planned no changes such as those at CBS. Shannon did mention that KMBC made some use of consultants, and Craft indicated some willingness to work on her appearance and dress.

Craft accepted the coanchor position at KMBC and at the station's request stopped in Dallas for a meeting with Lynn Wilford of Media Associates before reporting to Kansas City. She made her debut as coanchor on January 5, 1981, and the testimony is essentially uncontradicted that Shannon and Replogle immediately began having concerns about her clothing and makeup. Wilford came to Kansas City on January 14 to work with Craft on dress as well as on various aspects of her presentation technique. It was during this visit that Wilford for the only time applied Craft's makeup, and the results on the 6 p.m. news were so unsatisfactory that Craft was allowed to remove the makeup before the 10 p.m. broadcast.

In the following months Shannon continued to make occasional suggestions or criticisms as to certain articles of Craft's clothing, and Craft was provided with materials, including the book *Women's Dress for Success*, on wardrobe and makeup. Then, beginning in April, KMBC arranged for Macy's Department Store to provide clothing for Craft in exchange for advertising time. Craft was

assisted by a consultant from Macy's in selecting outfits. She would then return to the KMBC studio, try on the clothing, and appear before camera so tapes could be made to send to Wilford for review.

On May 19 and 20, 1981, Media Associates initiated some research of viewer perceptions of KMBC's newscasts by conducting four "focus group" discussions. By this technique groups of ten individuals viewed sample video tapes of local news programs and then gave their reactions in sessions moderated by a Media Associates representative. The response to Craft's appearance was, as summed up by the district court, "overwhelmingly negative." 572 F.Supp. at 873. When Replogle and Shannon met with Craft the following day to discuss this result, Craft at first wanted to be let out of her contract to return to California. Replogle, however, stated that management was ready to work with her to overcome the problems, and Craft ultimately agreed to cooperate. Thereafter, her wardrobe was more closely supervised, and the "clothing calendar"[2] then mentioned by Replogle was eventually instituted in late July or early August.

As a further follow-up, KMBC and Media Associates in late June conducted a telephone survey of some 400 randomly selected persons in the greater Kansas City viewing area. These persons were asked to respond to a questionnaire specifically drafted to pursue issues raised in the focus group discussions. For example in one segment the survey participants were asked to rank Craft in comparison with the female coanchors at KMBC's com-

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2. The "clothing calendar" was a calendar given to Craft showing in detail for each day the blazer, blouse, and skirt (or occasionally slacks) she was to wear. A note in one corner indicated that the appropriate accessory would be either a single strand of pearls or a single gold chain.

petitors in response to some fourteen statements, four of which dealt with "good looks" or the dress of and image of a "professional anchor woman." Craft came out trailing in almost every category. Media Associates' report on the results of this survey, which was conveyed to Shannon and Replogle on August 3, 1981, suggested that Craft was having an extremely adverse impact on KMBC's acceptance among Kansas City viewers. On August 13 Media Associates recommended that Craft be replaced, and KMBC, after initial resistance, agreed.

The next day Shannon told Craft she was being reassigned to reporter at no loss of pay or contractual benefits. He characterized the results of the research, in the language of the district court, as "devastating and unprecedented in the history of the consultants of Media Associates." 572 F.Supp. at 874. Craft states that Shannon also told her she was being reassigned because the audience perceived her as too old, too unattractive, and not deferential enough to men. Shannon, however, specifically denies making such a statement, and the district court believed his version of the conversation. *Id.*

After the weekend Craft sent a telegram to KMBC refusing to accept reassignment, and when further discussions failed to resolve the matter, she returned to Santa Barbara where on September 1, 1981, she commenced work as a coanchor at the television station at which she previously had been employed. This suit followed in four counts: the Title VII sex discrimination and the fraud counts, the allegation of violation of the Equal Pay Act based on the differential between Craft's and Scott Feldman's salaries, and an allegation of prima facie tort based on an intent by KMBC to injure Craft. This last count was abandoned during the first trial in Kansas City.

Following that first trial the district court rejected the findings of the advisory jury[3] on the Title VII sex discrimination claim and entered judgment for Metromedia on that issue. The district court found that KMBC required both male and female on-air personnel to maintain professional, businesslike appearances "consistent with community standards" and that the station enforced that requirement in an evenhanded, nondiscriminatory manner. 572 F.Supp. at 877-78. Any greater attention to Craft's appearance, the court concluded, was "tailored to fit her individual needs" and was necessary because of her "below-average aptitude" in matters of clothing and makeup. *Id.* at 878. The district court also found that Craft had not been constructively discharged because there was insufficient evidence that her working conditions had become so intolerable that she had no choice but to quit or that KMBC had intended to force her resignation. *Id.* at 879. Finally, the court concluded that the telephone survey conducted by Media Associates had not been discriminatory or designed to effect Craft's removal as co-anchor and that KMBC had reasonably relied on the survey results as the basis for the personnel change. *Id.* at 873-878-79.

As to the Equal Pay Act count, the district court upheld the jury verdict in favor of Metromedia and refused to grant Craft a new trial. It rejected her allegations of error in the jury instructions and in the exclusion of certain testimony and concluded that the weight of the evidence was not contrary to the jury's finding that Feldman's higher salary was based on permissible factors such

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3. There is no right to a jury trial in a Title VII suit *Harmon v. May Broadcasting Co.*, 583 F.2d 410, 410 (8th Cir. 1978). Advisory use of the jury is authorized by Rule 39(c) of the Federal Rules of Civil Procedure.

as his education in broadcasting, his greater experience in major television markets, and his established identity with Kansas City viewers.[4] *Id.* at 876, 879-80.

The district court, however, granted Metromedia a new trial on the fraud count. In a bifurcated procedure the Kansas City jury had found liability and awarded Craft $375,000 in actual damages and then, after additional instructions, had awarded her $125,000 in punitive damages. The court declared itself "firmly convinced" that the verdict was "excessive" and "the result of passion, prejudice, confusion, or mistake on the part of the jury." *Id.* at 881. In support it cited the "unprincipled" award of actual damages nearly double that requested by Craft in her complaint (and nearly four times the amount she asked for at closing argument), instructional errors as to wrongful discharge and in the implementation of the bifurcated damages submission, and the "incessant and overwhelming" publicity surrounding the case. *Id.* at 881-82. The district court ordered that the new trial on the fraud count be held in Joplin, Missouri, with the jury to be sequestered. *Id.* at 882.

On retrial the jury again found for Craft, awarding $225,000 actual and $100,000 punitive damages. After the district court denied motions for judgment notwithstanding the verdict and for another new trial, Metromedia filed this appeal and Craft cross-appealed from the adverse determinations on her Title VII and Equal Pay Act claims.

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4. Craft had also asserted the pay differential as an incident of sex discrimination in violation of Title VII, but the district court held that that claim was merely duplicative of the Equal Pay Act count and found the jury verdict dispositive. *See Orahood v. Board of Trustees of the Univ. of Ark.*, 645 F.2d 651, 654 n. 3 (8th Cir.1981) (defendant may not be held liable under Title VII when one of four affirmative defenses of the Equal Pay Act has been established); *see generally Washington County v. Gunther*, 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981).

I.

Craft's attacks on the district court's disposition of her Title VII sex discrimination claim are essentially factual, rather than legal as she contends. Her central position is that KMBC's appearance standards were based on stereotyped characterizations of the sexes and were applied to women more constantly and vigorously than they were applied to men. Her further contentions that the district court erred in finding certain grooming cases controlling and in allowing Metromedia to rebut her prima facie case with stereotypical customer preferences follow only if we accept her central factual position.

A.

As an initial matter Craft argues that, since her case was one involving direct evidence of discrimination, the district court erred in failing to shift the burden to Metromedia to prove by a preponderance of the evidence that it would have taken the challenged actions even in the absence of gender bias. *E.g., Bell v. Birmingham Linen Service,* 715 F.2d 1552, 1557 (11th Cir.1983), *cert. denied,* ..... U.S. ....., 104 S.Ct. 2385, 81 L.Ed.2d 344 (1984); *Lee v. Russell County Board of Education,* 684 F.2d 769, 774 (11th Cir.1982). The cases relied on by Craft, however, involved direct testimony of discrimination accepted by the trier of fact. *Bell,* 715 F.2d at 1557; *Lee,* 684 F.2d at 774-75. It is apparent that the district court did not accept any such testimony in this case. Thus, the burden-shifting rule for which Craft argues could have no application here, and we need not give further consideration to whether it should be adopted by this circuit. *See Clay v. Hyatt Regency Hotel,* 724 F.2d 721, 724 (8th Cir.1984) (no direct evidence that employer acted with a discriminatory motive); *see also Norcross v. Sneed,* 755 F.2d 113, 118 (8th

Cir.1985) (to same effect in handicapped discrimination suit under 29 U.S.C. § 794 (1982)).

In the alternative, Craft argues that she also established a Title VII violation through use of circumstantial evidence and inferences under the *McDonnell Douglas* pattern of proof.[5] The district court plainly considered whether KMBC's position was pretextual, which indicates that it reached its decision through this mode of analysis. On review, however, we need not discuss the record in terms of "prima facie case," "articulation of a legitimate, nondiscriminatory reason," and "pretext" but instead may look directly to the ultimate factual issue: whether the defendant intentionally discriminated against the plaintiff. *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 715, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983); *see Easley v. Empire Inc.,* 757 F.2d 923, 929-30 (8th Cir.1985). As the district court recognized, the burden of proof on this issue always remains with the plaintiff. *Craft,* 572 F.Supp. at 876-77 (quoting *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981)). A finding of intentional discrimination is a factual finding, *Pullman-Standard v. Swint,* 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982), *cited in Anderson v. City of Bessemer City,*

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5. Under the analysis set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-05, 93 S.Ct. 1817, 1824-45, 36 L.Ed.2d 668 (1973), after a party suffering an adverse employment action proves some set of facts—the "prima facie case"—sufficient to give rise to an inference that the employer was motivated by discrimination, the employer must then articulate a legitimate reason for the decision so as to dispel the inference of discrimination while finally the aggrieved party has the opportunity to show that the reason articulated was a pretext and that the employer actually was improperly motivated. *See generally Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

..... U.S. ....., 105 S.Ct. 1504, 1508, 84 L.Ed.2d 518 (1985), and the court found against Craft.

Finally, Craft argues that the district court erred in finding her claim of discrimination in employment conditions controlled by grooming cases such as *Knott v. Missouri Pacific Railroad,* 527 F.2d 1249 (8th Cir.1975). In *Knott* we held that appearance regulations making distinctions on the basis of sex will not support allegations of discrimination when the standards are reasonable and are enforced as to both sexes in an evenhanded manner. *Id.* at 1252. Again what Craft really contests is the district court's *factual* determination that KMBC's actions concerning the appearance of its on-air personnel fell within the *Knott* guidelines.

Because many of Craft's arguments boldly seek reevaluation of the evidence and rejection of the district court's factual findings, we make clear our limited standard of review in such cases. Factual findings may be set aside only when clearly erroneous. *See* Fed.R.Civ.P. 52(a). Our "foremost principle" is that " 'a finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *Anderson v. City of Bessemer City,* ..... U.S. ....., 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (quoting *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)); *see Hoefelman v. Conservation Commission of Missouri,* 718 F.2d 281, 285 (8th Cir.1983). We may not duplicate the function of the district court by making our own determination of the facts and reversing if we believe we would have decided the case differently: "Where there are two permissible views of the evidence,

the factfinder's choice between them cannot be clearly erroneous." *Anderson,* 105 S.Ct. at 1512; *Inwood Laboratories v. Ives Laboratories,* 456 U.S. 844, 857-58, 102 S.Ct. 2182, 2190-91, 72 L.Ed.2d 606 (1982).

Furthermore, we have stated that the burden is on the objecting party to clearly demonstrate error in the factual findings. *Aetna Casualty & Surety Co. v. General Electric Co.,* 758 F.2d 319, 323 (8th Cir.1985); *Hunt v. Pan American Energy,* 540 F.2d 894, 901 (8th Cir.1976), *cert. denied,* 429 U.S. 1062, 97 S.Ct. 786, 50 L.Ed.2d 778 (1977); *Reilly v. United States,* 513 F.2d 147, 150 n. 2 (8th Cir.1975). The evidence is to be construed in the light most favorable to the party prevailing below. *Tautfest v. City of Lincoln,* 742 F.2d 477, 481 (8th Cir.1984); *United Barge Co. v. Notre Dame Fleeting & Towing Service,* 568 F.2d 599, 602 (8th Cir.1978).

B.

We turn first to the most prominent factual element of Craft's case—her testimony that Shannon told her she was being reassigned because she was too old, too unattractive, and not deferential enough to men or because the audience perceived her as such. Shannon, however, specifically denied making that statement. The only additional evidence[6] was that of Feldman, who testified on

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6. Craft argues that the statement attributed to Shannon would be consistent with the survey results and the station's interpretation thereof; however, no questions on the survey dealt with age, and Craft actually was rated lowest among her female counterparts as to the *strength* "does not play second fiddle' to male anchor. The testimony of Brenda Williams that Shannon told her Craft was being removed because people didn't like her appearance is basically consistent with what the district court found Shannon did tell Craft and does not support the idea that Shannon went further and made the "too old" comment. Finally, Craft argues that the district court never expressly re-

(Continued on following page)

the stand at trial that he did not recall Shannon making such a comment but who had said in his deposition that Shannon had done so—again diametrically opposite testimony, this time from one witness. Credibility thus was central to the district court's finding on this point.

Respect for the role of the district court is especially crucial as to determinations which rest on "variations in demeanor and tone of voice" of the witnesses and "the listener's understanding of and *belief in* what is said." *Anderson,* 105 S.Ct. at 1512 (emphasis added). The Supreme Court has cautioned:

> [W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can *virtually never* be clear error.

Id. at 1513 (emphasis added). The district court was in the best position to determine whether to believe Shannon or Craft, and there are no circumstances suggesting any basis for finding clear error in the district court's choice in favor of Shannon.

Craft next argues, as do the amici curiae, that the district court clearly erred in failing to find that KMBC enforced appearance standards more strictly as to female

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Footnote continued—

jected her testimony that Shannon also told her viewers wanted to see "young, pretty women for news anchors." We believe, however, that this statement was implicitly discounted by the court through its failure to include any such comment in its affirmative findings as to what Shannon did say to Craft and through its discrediting of the "too old, too unattractive" testimony. *Craft,* 572 F.Supp. at 874.

than as to male on-air personnel.[7] In support of her position she points to the evidence most favorable to her, which shows that only females were subject to daily scrutiny of their appearance or were ever required to change clothes at the station before going on the air and that no male was ever directed to take time from his journalistic duties to select clothing, with the help of a consultant, from Macy's and to test that clothing on camera for the approval of another consultant. The district court, however, concluded that such facts, in light of other evidence, showed only that KMBC was concerned with the appearance of all its on-air personnel and that it took measures appropriate to individual situations, characteristics, and shortcomings. *Craft,* 572 F.Supp. at 875, 876, 878. The court found that KMBC had only gradually increased its attentions to Craft's appearance, with the institution of the clothing calendar representing the culmination of efforts made necessary when lesser suggestions, such as those complied with by other personnel, proved ineffective. *Id.* at 878.

The evidence shows that one female, Brenda Williams, had never been the subject of criticism for her appearance while numerous males on occasion had been given specific

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7. The court instead concluded,

> If anything, [the] evidence shows a consistent concern by management over the appearance of all on-air personnel without regard to sex but with regard to the peculiar characteristics of each employee. Plaintiff was an employee of atypical aptitudes and attitudes, and defendant merely acted to correct appearance problems which plaintiff was unable or unwilling to remedy. The actions taken by defendant in regard to plaintiff's appearance were not the result of any general animus toward women or of any specific animus toward plaintiff as a woman. It may well be that in plaintiff's case some of the steps taken by management were unprecedented, but they were not ipso facto discriminatory.

Craft, 572 F.Supp. at 878.

directions as to their individual shortcomings. Mike Placke, for example, had been told to lose weight, to get better-fitting clothes, to refrain from wearing sweaters under jackets, and to tie his necktie in a certain manner. Similarly, Michael Mahoney had been told to lose weight and to pay more attention to his wardrobe and hairstyle, while Bob Werley had been told to try wearing contact lenses and to get a hair piece and had been given a makeup chart on a form similar to that used with Craft. Shannon had discussed hair or moustache problems with Tim Richardson, Dave Dusik, Stan Carmack, and Corrice Collins, and Craig Sager had been advised to improve his wardrobe. Even Feldman on at least two occasions had received specific directives regarding his choice of shirts, and the Macy's clothing consultant who worked with Craft testified that she had also met with Feldman and Dusik. Media Associates eventually prepared wardrobe "dos" and "don'ts" for male as well as female newscasters.[8] The district court found that the male personnel generally complied with grooming suggestions.

An interpretation of this record as showing that KMBC enforced its appearance standards equally as to males and females in response to individual problems is neither "illogical" nor "implausible" and has "support in inferences that may be drawn from the facts." *Anderson*, 105 S.Ct. at 1513. We cannot conclude that the district court erred in this respect.

Our determination is not altered by the testimony, cited by Craft, of the consultant Wilford or of other female KMBC employees to the effect that the station put

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8. Shannon testified that the tips for females were prepared in May 1981 primarily for Craft while the guides for males were not prepared until November 1981, around three months after Craft left the station.

more emphasis on the appearance of females. This testimony represents only the opinions and impressions of the witnesses as to KMBC's policy, and the district court by implication rejected such opinions, making its own finding to the contrary on the record.[9] The court also apparently chose not to believe testimony by Pam Whiting that Shannon had said it was more important for she and Craft than for Feldman to look good on the air; Whiting herself had been subject to a great deal of attention as to her appearance and had eventually left the station, and on the stand she expressed the opinion that appearance was overemphasized in television news and said she hoped Craft prevailed. Finally, the district court attributed the use in the survey of questions on appearance and good looks only as to female anchors as prompted not by sexual bias but by the concerns raised as to Craft by the focus groups. *Craft,* 572 F.Supp. at 873. The viewers were asked to rank the male anchors on more points concerning personality and "coldness," Feldman's perceived weaknesses. The inclusion of a makeup criterion and a requirement that Craft not deviate from her clothing calendar in the "standards of performance" by which her work was to be evaluated, in contrast to the absence of any appearance objectives in Feldman's "standards of performance," similarly just reflected management's efforts to pursue with personnel their individual weaknesses.[10]

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9. Furthermore, the female employees generally testified only that they had no *knowledge* of criticisms by KMBC of the appearance of male on-air personnel. In a strict sense such testimony is not even inconsistent with that of Shannon that such criticisms were made.

10. Feldman's temper and personality, for example, were his special problems. He frequently argued with the female producers, and management had spoken to him about his "throwing curve balls" during newcasts to fluster other on-air personnel. In addition, he had been sharply reprimanded for referring to Craft in the newsroom as "that girl."

Craft further argues, however, again joined by the amici curiae, that even if KMBC was evenhanded in applying its appearance standards, the district court erred in failing to recognize that the standards themselves were discriminatory.[11] She contends that she was forced to conform to a stereotypical image of how a woman anchor should appear. The evidence included a communication from the consultant, Wilford, to Shannon suggesting that Craft purchase more blouses with "feminine touches," such as bows and ruffles, because many of her clothes were "too masculine." The general wardrobe hints for females developed by Media Associates warned that women with "soft" hairstyles and looks should wear blazers to establish their authority and credibility while women with short "masculine" hairstyles shouldn't wear "masculine" clothing in dark colors and with strong lines because they would appear too "aggressive." The district court found that Craft had been hired to "soften" KMBC's news presentation. *Id.* at 871.

The "dos" and "don'ts" for anchors suggested that while males should remember "professional *image*," female anchors were to remember "professional *elegance*" (emphasis added). The outfits on the clothing calendar given to Craft were dominated by recognized fashion labels. Wilford testified that in April she had told Craft not to wear the same outfit more than once every three to four weeks because people would start calling in about it; males,

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11. The court instead concluded,

> Thus, defendant's standards of appearance for its on-air personnel can in no way be considered discriminatory per se. Both men and women were required to maintain a professional, business-like appearance consistent with community standards. Since television is a visual medium, as plaintiff admitted in her testimony, such a reasonable requirement is obviously critical to defendant's economic well-being.

Craft, 572 F.Supp. at 877.

however, Wilford said, could wear an outfit every week and a suit even twice within the same week if combined with a different tie. Wilford further testified that viewers —particularly other women—criticize women more severely than men for their appearance on camera and that women's dress is more complex and demanding because "society has made it that way." Craft's argument is that these differing standards as to females reflect customer preferences, which a number of cases have held cannot justify discriminatory practices. *E.g., Diaz v. Pan American World Airways,* 442 F.2d 385, 389 (5th Cir.), *cert. denied,* 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed.2d 267 (1971); *see also Gerdom v. Continental Airlines,* 692 F.2d 602, 609 (9th Cir.1982), *cert. dismissed,* 460 U.S. 1074, 103 S.Ct. 1534, 75 L.Ed.2d 954 (1983); *Fernandez v. Wynn Oil Co.,* 653 F.2d 1273, 1276-77 (9th Cir.1981).

The district court, however, found that KMBC's appearance standards were based instead on permissible factors. 572 F.Supp. at 877. While there may have been some emphasis on the feminine stereotype of "softness" and bows and ruffles and on the fashionableness of female anchors, the evidence suggests such concerns were incidental to a true focus on consistency of appearance, proper coordination of colors and textures, the effects of studio lighting on clothing and makeup, and the greater degree of conservatism thought necessary in the Kansas City market. The "dos" and "don'ts" for female anchors addressed the need to avoid, for example, tight sweaters or overly "sexy" clothing and extreme "high fashion" or "sporty" outfits while the male "dos" and "don'ts similarly cautioned against "frivolous" colors and "extreme" textures and styles as damaging to the "authority" of newscasters. These criteria do not implicate the primary thrust of Title VII, which is to prompt employers to "dis-

card outmoded sex stereotypes posing distinct employment disadvantages for one sex." *Knott v. Missouri Pacific Railroad,* 527 F.2d 1249, 1251 (8th Cir.1975); *see generally* Note, *Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearance,* 85 Colum.L.Rev. 190, 201 (1985).[12]

Courts have recognized that the appearance of a company's employees may contribute greatly to the company's image and success with the public and thus that a reasonable dress or grooming code is a proper management prerogative. *E.g., Fagan v. National Cash Register Co.,* 481 F.2d 1115, 1124-25 (D.C.Cir.1973); *La Von Lanigan v. Bartlett & Co. Grain,* 466 F.Supp. 1388, 1392 (W.D.Mo. 1979). Evidence showed a particular concern with appearance in television; the district court stated that reasonable appearance requirements were "obviously critical" to KMBC's economic well-being; and even Craft admitted

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12. Dress requirements that have been found to violate Title VII have generally involved, for example, demeaning stereotypes as to female characteristics and abilities or stereotypical notions of female attractiveness or use of female sexuality to attract business. *E.g., Gerdom v. Continental Airlines,* 692 F.2d 602, 608-09 (9th Cir.1982) (weight requirements for female flight attendants to insure slenderness), *cert. dismissed,* 460 U.S. 1074, 103 S.Ct. 1534, 75 L.Ed.2d 954 (1983); *Carroll v. Talman Fed. Sav. & Loan Ass'n,* 604 F.2d 1028, 1032-33 (7th Cir.1979) (requirement that only female employees wear uniforms was demeaning and implied that females had lesser professional status and was based on the stereotype that females are so caught up in competition as to appearance that they cannot adhere to good business taste as to dress), *cert. denied,* 445 U.S. 929, 100 S.Ct. 1316, 63 L.Ed.2d 762 (1980); *Laffey v. Northwest Airlines,* 567 F.2d 429, 439 n. 24 (D.C.Cir.1976) (female cabin attendants forbidden to wear eyeglasses), *cert. denied,* 434 U.S. 1086, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1978); *Equal Empl. Opportunity Comm'n v. Sage Realty Corp.,* 507 F.Supp. 599, 607-11 (S.D. N.Y.1981) (female lobby attendant required to wear revealing and provocative uniform that subjected her to sexual harassment). *Cf. Wilson v. Southwest Airlines Co.,* 517 F.Supp. 292 (N.D. Tex.1981) (flight attendant position limited to females by employer who merely wished to exploit female sexuality as a marketing tool to attract customers and insure profitability).

she recognized that television was a visual medium and that on-air personnel would need to wear appropriate clothes and makeup. *Craft*, 572 F.Supp. at 877; *see* Note, *supra*, at 201 ("As television is a visual medium, television networks and local stations clearly have a right to require both male and female anchors to maintain a professional appearance while on camera."). While we believe the record shows an overemphasis by KMBC on appearance, we are not the proper forum in which to debate the relationship between newsgathering and dissemination and considerations of appearance and presentation—i.e., questions of substance versus image—in television journalism. The record does not leave us with the "definite and firm conviction" that the district court erred or adopted an impermissible view of the evidence when it concluded that KMBC's appearance standards were shaped only by neutral professional and technical considerations and not by any stereotypical notions of female roles and images.

We further reject the argument of Craft that the perception, discussed above, that she would add warmth and "comfortability" to the newscast defined a stereotypical "female" role, secondary to that of the male anchor, into which she was forced in terms of story assignments and division of duties. First, we observe that the research survey asked participants to rank both male and female anchors in response to the statement "comfortable to watch." In addition, the district court rejected Craft's factual contention that Feldman was assigned the lead story more frequently and was given more live stories while she was assigned the human interest, personal, and humorous stories. The court, for example, while acknowledging the testimony of news producer Sandra Woodward that she initially was instructed to give Feldman

about two-thirds of the lead stories, also accepted testimony of Shannon that that policy had been designed to ease the transition to coanchors for Craft and the viewers and was discontinued after a few weeks, after which time the lead stories were equitably divided. *Craft*, 572 F. Supp. at 872, 875. The court further found that the on-site reporting and hard news stories were equitably distributed. *Id.* at 875. Finally, Shannon testified that Craft herself suggested her Thursday arts and entertainment segment to take advantage of her cultural background and her contacts from Santa Barbara with various Hollywood personalities. Craft cites no facts sufficient for us to find the district court's interpretation of the record in this regard clearly erroneous.

We also cannot conclude that the district court erred when it held that Craft was not impermissibly removed as anchor on the basis of gender. While we disposed earlier of the alleged "too old, too unattractive" statement and have also already discussed the legitimate reasons why the survey questions focused on appearance only as to the female and not as to the male anchors, Craft further argues that her reassignment was based on a discriminatory interpretation of the survey results. She contends that discrimination may be inferred in that KMBC attributed all the negative viewer reaction to her despite Feldman's earlier problems in the ratings and the failure of most respondents to name him as a positive reason for watching the station. She further alleges that she was unfairly burdened with having to offset Feldman's weaknesses. The inferences on which she relies, however, are insufficient to justify setting aside the conclusions of the district court.

Craft essentially is asking us to reject the district court's findings accepting Media Associates' interpretation

of the survey data and to substitute our own interpretation thereof. The evaluation of expert testimony, however, is primarily the function of the district court. *Hoefelman v. Conservation Commission of Missouri*, 718 F.2d 281, 284-85 (8th Cir.1983). The court here specifically found that the survey had been "conducted in accordance with generally accepted principles of survey research" and that its results were "trustworthy." *Craft*, 572 F.Supp. at 873. Craft scored low on many neutral points such as knowledge of Kansas City, journalism ability, and apparent enjoyment of her job, and the court found "simply no evidence" that the survey had been designed to effect her removal because of her gender. *Id.* at 878. It concluded that KMBC was entitled to—and did—rely on the Media Associates report. *Id.* at 879.

We further reject Craft's argument that even if the survey was objective, KMBC's reliance on it was merely a pretext because the station ignored improved ratings and profits during her tenure: This shows only that broadcast market research is an inexact science and does not make clearly erroneous the district court's conclusion that KMBC still relied upon the survey in good faith. The court in addition found that the ratings cited by Craft were "equivocal at best" and were not yet available when she was reassigned. *Id.* at 876. KMBC's failure to delay its decision a few days until the ratings did come out may just be testament to the unprecedented negative reaction to Craft suggested by the survey. Finally, KMBC's allegedly differing treatment of two males who also were criticized in the survey is insufficient to raise an inference of discrimination because of the more extreme nature of Craft's difficulties and Craft's pivotal role on the newscast as coanchor.

C.

Our conclusion that Craft was not subject to sex discrimination either in KMBC's application of its appearance standards or in its reassignment of her to reporter effectively determines the outcome of her claim of constructive discharge. Craft does not dispute that such a claim requires a showing of work conditions that a reasonable person would find intolerable, *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir.1981); she contends, however, that a finding of unlawfully discriminatory working conditions is sufficient to meet this standard. *See Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir.1982). Given the absence of such a finding here, her argument fails. Furthermore, even if we were to accept Craft's argument that her reassignment (which was permitted by the terms of her contract) or the criticism of her appearance, while not discriminatory, did make her working conditions intolerable, the district court found no evidence that KMBC took those actions with an intent to force her to quit. *See Bunny Bread*, 646 F.2d at 1256. The court in fact believed testimony that Replogle in May had urged Craft to remain as anchor and that Shannon at the time of the reassignment had urged Craft to reconsider her immediate reaction and remain as reporter rather than returning to Santa Barbara. *Craft*, 572 F.Supp. at 874, 879.

D.

In sum, Craft's arguments as to her Title VII discrimination claims are basically factual invitations to us to reevaluate the record and interpret the evidence in the light most favorable to her while overlooking substantial evidence favorable to KMBC.[13] Even her con-

13. Craft's argument rests in part on the failure of the district court to take into consideration many issues raised by

(Continued on following page)

tention, for example, that the district court in finding no discrimination erred "as a matter of law" addresses a factual issue. To grant her relief we would have to adopt findings contrary to those of the district court and assume a judicial role contrary to that assigned to us by Rule 52(a) and Supreme Court precedent. *See Anderson, supra; Pullman-Standard, supra.* We decline to do either. The district court found that KMBC was equally concerned with the appearance of its male and female on-air personnel and that any extra attention to Craft was the gradual result of her indifference to the station's legitimate need that she maintain a professional, businesslike image appropriate to Kansas City. The court further found that Craft's reassignment to reporter was made in reasonable reliance on a proper market survey and that no constructive discharge occurred. We are not firmly convinced that any of these conclusions is clearly erroneous.

II.

Turning to the fraud claim, Metromedia argues that, as a matter of law, Craft failed to make a submissible jury issue. The alleged misrepresentation, as set out in the verdict directing instruction requested by Craft at the Joplin trial, was that "defendant represented to the plaintiff that her appearance was fine and that defendant liked everything about her appearance and intended no make-

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Footnote continued—

her evidence. We have already discussed a number of such claims, and we do not believe the district court's order is deficient in failing to deal with every piece of evidence in the record, particularly in light of the ten-day trial resulting in a transcript in excess of 2,000 pages. *See Tate v. Weyerhaeuser Co.*, 733 F.2d 598, 605 (8th Cir.1983), *cert. denied*, ... U.S. ....., 105 S.Ct. 160, 83 L.Ed.2d 97 (1984); *Talley v. United States Postal Service*, 720 F.2d 505, 507 (8th Cir.1983), *cert. denied*, ... U.S. ....., 104 S.Ct. 2155, 80 L.Ed.2d 541 (1984).

over or substantial changes in her appearance."[14] Specifically, Metromedia contends that this statement is one of opinion or value that will not support a fraud claim or is too indefinite to be actionable and that there is insufficient evidence that the statement was false or false when made.[15]

The parties do not dispute that Missouri law applies to Craft's fraud claim. Under such law the burden is on the plaintiff to establish a submissible case of fraud, and failure as to any one essential element is fatal to the entire claim. *Powers v. Shore,* 248 S.W.2d 1, 5 (Mo.1952) (en banc); *Lowther v. Hays,* 225 S.W.2d 708, 713 (Mo. 1950); *Emily v. Bayne,* 371 S.W.2d 663, 666 (Mo.Ct.App. 1963). Fraud may be established by circumstantial evidence, *Martin v. Brune,* 631 S.W.2d 77, 80 (Mo.Ct.App. 1982); however, it may not be presumed, and a party's case will fail if he can show only facts and circumstances which are equally consistent with honesty and good faith. *Macon-Atlanta State Bank v. Gall,* 666 S.W.2d 934, 941 (Mo.Ct.App.1984).

The standard of review as to the submissibility of Craft's case is the same under both federal and Missouri

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14. At the first trial Craft also submitted as a representation that she was hired specifically for the job of coanchor and for no other purpose. She expressly abandoned this claim at the second trial in Joplin. Our review of the submissibility of the fraud claim is based on the record at that trial, but we observe that our study of the record of the Kansas City trial revealed no evidence favorable to Craft that was not also before the second jury.

15. Metromedia also argues that there is insufficient evidence that Craft relied on the alleged misrepresentation or suffered damages attributable thereto, that Craft waived her claim, and, in the alternative, that a third trial should be held because of errors in admission of evidence, the jury instructions, and closing arguments. Because of our disposition of the issues set forth in the body of our opinion, we need not reach these additional points.

law. *Crues v. KFC Corp.*, 729 F.2d 1145, 1148 (8th Cir.1984). We may find for Metromedia only if "all the evidence points one way and is susceptible of no reasonable inferences sustaining the position" of Craft. *Id.* (quoting *Dace v. ACF Industries*, 722 F.2d 374, 375 (8th Cir.1983) (quoting *Decker-Ruhl Ford Sales v. Ford Motor Credit Co.*, 523 F.2d 833, 836 (8th Cir.1975)). Furthermore, we must resolve direct factual conflicts in favor of Craft, assume as true all facts in her favor which the evidence tends to prove, and give her the benefit of all reasonable inferences. We may not find for Metromedia if the evidence so viewed would "allow reasonable jurors to differ as to the conclusions that could be drawn." *See Crues*, 729 F.2d at 1148 (quoting *Dace*, 722 F.2d at 375).

A.

It is true, as Metromedia argues, that a statement of opinion or value is not an actionable representation of fact because it relates to terms of degree capable of different interpretations. *E.g., Carrier Corp. v. Royale Investment Co.*, 366 S.W.2d 346, 356 (Mo.1963) (statement that a refrigerating machine is "easy" to install is not an actionable representation because the term "easy" has a comparative or relative connotation). While this principle may be relevant to KMBC's statements that it "liked" Craft's appearance, it is not controlling as to the more crucial portion of the submitted representation that the station did not intend any "makeover or substantial changes" in Craft's appearance.

Statements of present intent may be representations of fact which, if false, will support fraud claims under Missouri law. *Kansas State Bank v. Citizens Bank of Windsor*, 737 F.2d 1490, 1498 (8th Cir.1984); *White v. Mulvania*, 575 S.W.2d 184, 188 (Mo.1978) (en banc). We

have no difficulty concluding that the "no makeover or substantial changes" representation requested by Craft in the instruction was a statement of present intent on the part of Shannon and Replogle. We do not believe the presence of somewhat imprecise terms such as "change" and "makeover" automatically renders their statement non-actionable "opinion" or "puffery" in the classical sense argued by Metromedia. Missouri courts have found sufficient allegations of fraud for the jury when service station operators have been told their leases would not be canceled if they ran "good" operations and performed "satisfactorily." *Essex v. Getty Oil Co.*, 661 S.W.2d 544, 549-51 (Mo.Ct.App.1983); *Sagehorn v. Phillips Petroleum Co.*, 648 S.W.2d 647, 649 (Mo.Ct.App.1983).

B.

The critical element in a fraud case based on a statement of present intent is proof that the speaker at the time of utterance actually did not intend to perform consistently with his words; absent such an inconsistent intent there is no misrepresentation of fact or state of mind but only a breach of promise or failure to perform. *See Grosser v. Kandel-Iken Builders*, 647 S.W.2d 911, 914 (Mo.Ct.App.1983); *Brennaman v. Andes & Roberts Brothers Construction Co.*, 506 S.W.2d 462, 465 (Mo.Ct.App.1973). It is not enough if for any reason, good or bad, the speaker changes his mind and fails or refuses to carry his expressed intention into effect. *Dillard v. Earnhart*, 457 S.W. 2d 666, 670 (Mo.1970) (quoting *Restatement of Torts* § 530 comment a (1938)). As Missouri courts thus have held, an intent not to perform

> cannot be established solely by proof of [the speaker's] nonperformance nor does his failure to perform the agreement throw upon him the burden of showing

> that his nonperformance was due to reasons which operated after the agreement was entered into. Such intention may be shown by any other evidence which sufficiently indicates its existence as, for example, the certainty that he would not be in funds to carry out his promise.

Dillard, 457 S.W.2d at 671 (quoting *Restatement of Torts* § 530 comment c (1938)). Craft's claim of fraud comes down to this narrow issue.

Craft argues vigorously that KMBC, contrary to the statements it made to her, had from the beginning a secret intention to substantially change or make over her appearance. She stresses Shannon's instruction to Wilford not to discuss makeup with Craft during their first meeting because he would be working with Craft himself on appearance and makeup. Wilford, prior to Craft's selection, had expressed the opinion that Craft's appearance was not conservative or sophisticated enough for Kansas City audiences, although the consensus of the Group at Media Associates had been that Craft was the strongest of the three finalists it screened. Shannon testified that he knew when he hired Craft that he would be working on her makeup and clothing, and criticism of her appearance began with her debut on the newscast. Shannon further testified that appearance was KMBC's major concern in an anchor, and Replogle agreed that while appearance was not the only qualification, it was the "first thing on the list." The evidence established that KMBC in the past had given performers direct orders with respect to their appearance. For example, Cheryl Jones had been ordered to change her hairstyle to eliminate the "frizzy appearance" (she was given her most recent formal portrait as a guide to what Replogle and Shannon wanted and was told that the result had to

be acceptable to them and that they would handle any questions from her hairdresser), and Mike Placke had been ordered to lose twenty-five pounds, to get a good-fitting suit, to avoid wearing sweaters and vests, and to tie his tie with a four-in-hand instead of a Windsor knot.

While this evidence supports the inference that Shannon and Replogle at the time they made the challenged statements knew they were going to work on Craft's appearance, we are not satisfied that it demonstrates that when they promised they intended "no makeover or substantial changes," such statements were false. It is well to consider further what "makeover or substantial changes" means.[16] The ultimate measure of the representation's truth or falsity is what Craft could reasonably have understood KMBC to have promised. *See Toenjes v. L.J. McNeary Construction Co.*, 406 S.W.2d 101, 105 (Mo.Ct.App. 1966). She testified that a "makeover" was "changing someone's appearance" and that she had believed KMBC didn't want to change anything about her. This position, however, is not totally consistent with the "*substantial* changes" (emphasis added) language submitted in the jury instruction. It seems plain, thus, that a jury could not reasonably have measured the falsity of KMBC's representation against Craft's subjective view of a "makeover" as any change at all. Therefore, the intent to work on Craft's appearance demonstrated abundantly by her evidence does not establish that Shannon and Replogle at the time of their representation had the intention to "make her over."

While it can be argued that Craft was "made over" in being forced to exchange her casual California beach

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16. Shannon and Replogle were convinced that the actions they took in regard to Craft did not constitute a "makeover."

look—she testified that in Santa Barbara she occasionally went directly from the beach to the studio—for a conservative, sophisticated, businesslike image of "professional elegance," we believe that in her audition interviews with KMBC Craft was concerned essentially with her hair and makeup and not with clothing.[17] The language of an alleged misrepresentation must be considered in light of the background in which the statements were made and the context in which the words were used. *Toenjes,* 406 S.W.2d at 105. KMBC's statements to Craft were made in response to her expressions of concern about her experience with CBS, where the network had required that her hair be cropped and died blond, her eyebrows shaved and died black, and heavy makeup applied.

Even if Craft does have an arguable position that the representation of "no makeover or substantial changes" had application to clothing, a reasonable jury could not have found a "makeover" until KMBC's efforts reached their most extreme extent in the late days of Craft's employment. There is, however, no evidence that the station at the time it made the challenged representation knew it would exercise such an intrusive degree of control or knew that such control would be in its eyes necessary. The record demonstrates that KMBC asserted varying degrees of control over the appearances of its on-air personnel, finding no control at all necessary as to Brenda Williams while requiring assorted measures of other an-

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17. The record reveals no action by KMBC in regard to Craft's hair or makeup that could be seen as constituting a "makeover." The station expressed a desire that her hair be worn at the length and natural color apparent in the Santa Barbara tape, and Craft assured the station that her shorter, lighter hairstyle upon arrival in Kansas City was due to a recent unsatisfactory styling and that she intended to let her hair grow back out. Furthermore, Craft was allowed to apply her own makeup except for the one ill-fated occasion, and we do not believe mere suggestions constitute a "makeover."

chors, sportscasters and weathercasters. There is no evidence that the station had any knowledge where along this spectrum Craft might fall or what facility she might demonstrate in adjusting her wardrobe to the Kansas City climate and market. In fact, the record is basically uncontradicted as to the gradual increase in the intensity of the measures taken by KMBC in regard to Craft's appearance. Craft at first was given only the most general advice through books and fashion magazines and a memorandum suggesting makeup techniques. Although Wilford testified that she had been asked on short notice to come to Kansas City in January, just days after Craft's debut as coanchor, to work specifically on Craft's (and Pam Whiting's) appearance, it was not until April that the arrangement with Macy's and its clothing consultant was established. The clothing calendar was not actually instituted until late July or early August.

Having considered the record in the light most favorable to Craft and given her the benefit of all favorable inferences, we must conclude that there is insufficient evidence for a reasonable jury to have found that KMBC at the time it made its representation contemplated such extensive measures as to her appearance so as to make false its statements that it intended "no makeover or substantial changes." Even taking the evidence as establishing that KMBC's actions differed from those promised, the record does no more than suggest that the station, because of the difficulties it experienced with Craft, changed its mind as to steps that would be necessary as to her appearance. *See Dillard,* 457 S.W.2d at 670 (quoting *Restatement of Torts* § 530 comment a (1938)). Such evidence does not establish Craft's case of fraud or shift the burden to KMBC to show that its "nonperformance" was caused by reasons operating after it made its repre-

sentation. *See Dillard,* 457 S.W.2d at 671 (quoting *Restatement of Torts* § 530 comment c (1938)). There is here, as in *Dillard,* a failure of proof that the statements of present intent were false when made. Craft as a matter of law has not established a submissible case of fraud. The judgment on the jury verdict on this issue must be reversed and the district court instructed to enter judgment in favor of Metromedia.

III.

In view of our conclusion above we need not reach Craft's arguments that the district court's factual findings on her Title VII claim impermissibly conflicted with the findings of the jury on the fraud claim and that the district court erred in granting a new trial on the fraud issue. We note, however, that the authority to grant or deny a new trial is a matter of discretion which we may not reverse absent a strong showing of clear abuse. *Commercial National Bank v. Missouri Pacific Railroad,* 631 F. 2d 563, 565 (8th Cir.1980); *Lane v. Chowning,* 610 F.2d 1385, 1388 (8th Cir.1979); *Bates v. Hensley,* 414 F.2d 1006, 1011 (8th Cir.1969).

Finally, Craft argues that the district court erred in excluding certain evidence offered on her equal pay claim and that the verdict against her on that claim was against the clear weight of the evidence. Specifically, Craft contends that Brenda Williams should have been allowed to testify that she was told she would not be hired to replace Craft as coanchor if she held out for a salary comparable to Feldman's and to give her opinion that the station had created a "female anchor" position that would pay only an amount substantially less than that paid to the male anchor. The admission of evidence, however, also is within the discretion of the district court, and we may not reverse

absent a "clear and prejudicial" abuse of that discretion. *Roth v. Black & Decker,* 737 F.2d 779, 783 (8th Cir.1984); *Haynes v. American Motors Corp.,* 691 F.2d 1268, 1272 (8th Cir.1982). When the excluded testimony is considered against the matters as to which Williams was allowed to testify before the jury, we cannot find such an abuse.

The weight of the evidence argument is particularly directed to the discretion of the district court; and while some of our decisions suggest that we could not review the denial of such a new trial motion even for abuse of discretion, *SCNO Barge Lines v. Anderson Clayton & Co.,* 745 F.2d 1188, 1194 (8th Cir.1984); *cf. Kelley v. Crunk,* 713 F.2d 426, 427 (8th Cir.1983) (per curiam) (weight of evidence arguments lead to serious seventh amendment questions), we need not reach that issue because we find no abuse of discretion here. *See Rey v. City of Fredericktown,* 729 F.2d 1171, 1174 (8th Cir.1984); *Aimor Electric Works v. Omaha National Bank,* 727 F.2d 688, 692 (8th Cir.1984); *Burnett v. Lloyds of London,* 710 F.2d 488, 489-90 (8th Cir.1983) (per curiam); *Minnesota Mutual Life Insurance Co. v. Wright,* 312 F.2d 655, 659-60 (8th Cir.1963); *see generally* C. Wright & A. Miller, *Federal Practice and Procedure* § 2819 (1973).

We affirm the judgment of the district court as to all the Title VII and Equal Pay Act issues but reverse the judgment entered on the jury verdict on the fraud count and instruct the district court to enter judgment for Metromedia.

(Filed June 28, 1985)

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 84-1336/1380WM

September Term, 1984

Christine Craft,
Appellee/Cross-Appellant,

vs.

Metromedia, Inc., d/b/a KMBC-TV 9,
Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Western District of Missouri

JUDGMENT

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is adjudged and decreed that the judgment of the said District Court against Craft on the Title VII and Equal Pay Act issues is affirmed. It is further adjudged and decreed that the judgment of the district court on the jury verdict on the fraud count be and is hereby reversed and the cause is remanded to the U.S. District Court for the Western Dis-

trict of Missouri with instructions to enter judgment for Metromedia in accordance with the opinion of this Court.

June 28, 1985

(See attached sheet for cost info.)

A true copy:

ATTEST:

/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals,
8th Circuit.

(Seal)

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

Nos. 84-1336/380-WM

Christine Craft,
Appellee/Cross-Appellant,

vs.

Metromedia, Inc.,
Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Western District of Missouri

Appellee-Cross-Appellant's Petition for Rehearing En Banc has been considered by the Court and is denied.

Petition for Rehearing by the panel is also denied.

The Court on its own motion substitutes pages 27 and 28 for pages 27 and 28 in the opinion as originally filed.*

August 19, 1985

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*See A37.

MODIFICATION OF OPINION OF JUNE 28, 1985, ISSUED AUGUST 19, 1985 ON CRAFT'S MOTION FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

While it can be argued that Craft was "made over" in being forced to exchange her casual California beach look—*Shannon testified that Craft had told him** that in Santa Barbara she occasionally went directly from the beach to the studio—for a conservative, sophisticated, businesslike image of "professional elegance," we believe that in her audition interviews with KMBC Craft was concerned essentially with her hair and makeup and not with clothing.[17] The language of an alleged misrepresentation must be considered in light of the background in which the statements were made and the context in which the words were used. *Toenjes*, 406 S.W.2d at 105. KMBC's statements to Craft were made in response to her expressions of concern about her experience with CBS, where the network had required that her hair be cropped and dyed blond, her eyebrows shaved and dyed black, and heavy makeup applied.

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17. The record reveals no action by KMBC in regard to Craft's hair or makeup that could be seen as constituting a "makeover." The station expressed a desire that her hair be worn at the length and natural color apparent in the Santa Barbara tape, and Craft assured the station that her shorter, lighter hairstyle upon arrival in Kansas City was due to a recent unsatisfactory styling and that she intended to let her hair grow back out. Furthermore, Craft was allowed to apply her own makeup except for the one ill-fated occasion, and we do not believe mere suggestions constitute a "makeover."

*Emphasis added to denote modification.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

Nos. 84-1336/380-WM

Christine Craft,
Appellee/Cross-Appellant,

vs.

Metromedia, Inc., etc.,
Appellant/Cross-Appellee.

Appeal from the United States District Court for the Western District of Missouri

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Appellee/cross-appellant Craft's motion for a stay of mandate is denied.

September 16, 1985

(Filed October 31, 1983)

IN THE UNITED STATES DISTRICT COURT
For the Western District of Missouri
Western Division

No. 83-0007-CV-W-8

CHRISTINE CRAFT,
Plaintiff,

vs.

METROMEDIA, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER*

Plaintiff Christine Craft filed her four-count complaint against defendant Metromedia, Inc. on January 5, 1983. Count I alleges that defendant discriminated against plaintiff on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Count II alleges that defendant paid plaintiff less than similarly situated male employees in violation of the Equal Pay Act of 1963, 29 U.S.C. § 206(d). Count III alleges that defendant made intentional fraudulent misrepresentations to induce plaintiff to accept employment. Count IV alleges that defendant's actions toward plaintiff, even if lawful, were intended to injure her and therefore constituted a prima facie tort.

Counsel prepared the case on an accelerated discovery schedule, and trial commenced on July 25, 1983. On the eleventh day of trial, a jury of two men and four women reached the following results: On Count I, the jury, sitting

*This Memorandum and Order is reported at 572 F.Supp. 868.

only in an advisory capacity under Fed.R.Civ.P. 39(c), found in favor of plaintiff. On Count II, the jury returned a verdict for defendant. On Count III, the jury found in favor of plaintiff and awarded actual damages of $375,000 and punitive damages of $125,000. Count IV was abandoned during trial and was not submitted to the jury.

Three matters are now before the court. First are findings of fact and conclusions of law on plaintiff's claim of sex discrimination. Second is plaintiff's motion for a new trial on her Equal Pay Act claim. Third is defendant's motion for judgment notwithstanding the verdict, new trial, or remittitur on the fraud count.

I. SEX DISCRIMINATION CLAIM

There is no right to a jury trial in discrimination actions filed under Title VII of the Civil Rights Act of 1964. *Harmon v. May Broadcasting Co.*, 583 F.2d 410 (8th Cir. 1978). Therefore, with respect to Count I, the jury functioned only in an advisory capacity under Fed. R. Civ. P. 39(c). *See Order of July 22, 1983.* This court is "at liberty to accept or reject the advisory verdict." *Chicago & Northwestern Railway Co. v. Minnesota Transfer Railway Co.*, 371 F.2d 129, 130 (8th Cir. 1967). Since the decision of an advisory jury is not binding on the court and presents nothing for appellate review, it is incumbent upon the court to enter findings of fact and conclusions of law under Fed. R. Civ. P. 52(a), just as if there had been no jury. *See* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2335 (1971).

A. Findings of Fact

Plaintiff Christine Craft is a female citizen of the United States and is a resident and citizen of California, residing at the time of trial at 3557 Padaro Lane, Car-

pinteria, California. Defendant Metromedia, Inc. is a Delaware corporation with its headquarters and principal place of business in New Jersey. Its headquarters are located at One Harmon Plaza, Secaucus, New Jersey. Prior to May 18, 1982, defendant was the owner and operator, pursuant to a license issued by the Federal Communications Commission, of KMBC-TV, Channel 9 (hereinafter KMBC), in Kansas City, Missouri. KMBC has been a network affiliate of the American Broadcasting Company (ABC) throughout the relevant period. Plaintiff was employed at KMBC as a staff announcer and performed duties as a co-anchor and reporter from December, 1980, to August 14, 1981. At all times here relevant, R. Kent Replogle was vice president and general manager of KMBC and Ridge Shannon was news director. Replogle was the highest ranking station employee, and Shannon reported directly to him. On May 18, 1982, the assets of KMBC were acquired by the Hearst Corporation, which is not a party to this action.

Plaintiff received a liberal arts degree in English and anthropology from the University of California at Santa Barbara in 1968. Upon graduation, she was first employed for two years as a teacher of emotionally disturbed and retarded children. Thereafter she pursued other interests, particularly surfing, and supported herself with an assortment of part-time jobs. Eventually, plaintiff decided to pursue a career in broadcasting. In mid-1975, she was hired as a weeknight weather reporter at KSBW-TV, a small station in Salinas, California. During her tenure of approximately one and one-half years, plaintiff worked as an announcer, reporter, and substitute sportscaster, in addition to her job as weather reporter. In late 1976 plaintiff became the weekend weather anchor at KPIX-TV in San Francisco, California, which is the sixth largest

television market in the nation. Plaintiff remained at KPIX for one year, and while there she also did some news reporting and substitute sports production and anchoring.

Plaintiff was next hired by CBS as the host of a segment of CBS Sports Spectacular entitled "Women in Sports." As part of this program, plaintiff was involved in summarizing weekly news concerning women's athletics and in producing weekly profiles of women athletes. While at CBS, plaintiff's appearance was altered by network makeup specialists. Her hair was cut short and bleached blonde, and she was required to use black eyebrow pencil and dark red lipstick. Plaintiff voiced objection to this treatment but did not voluntarily leave her employment at CBS because of it. "Women in Sports" was discontinued after thirty weeks. Plaintiff returned to California and engaged in pursuits other than television for about a year.

In mid-1979, plaintiff returned to television as a reporter at KEYT-TV in Santa Barbara, California, which is the 116th largest television market in the nation. Plaintiff also served as weeknight news anchor and occasionally presented sports and weather. Plaintiff resigned her employment at KEYT in December, 1980, to accept employment with defendant at KMBC in Kansas City.

Kansas City is the nation's twenty-seventh largest television market, and KMBC has two main competitors: KCTV (formerly KCMO-TV), Channel 5, the CBS affiliate; and WDAF-TV, channel 4, the NBC affiliate. From July, 1978, to January 5, 1981, Scott Feldman was the solo anchor on the 6 p.m. and 10 p.m. weekday newscasts at KMBC. For several years prior to Feldman's arrival in 1978, defendant had been the ratings leader in the local television news market, but its ratings had slipped since Feldman's

arrival. Research indicated that the decline was due to two factors: the appearance of co-anchors at KMBC's competitors, and a perception among viewers that Feldman lacked warmth, thereby diminishing his professionalism and authoritativeness. Based on that research and the presence of co-anchors at KMBC's competitors, Replogle and Shannon determined that KMBC should adopt a co-anchor format and that, in order to "soften" the image of its news presentation, the co-anchor should be a woman.

In the search for a female co-anchor, Shannon reviewed videotapes of numerous candidates. The Media Associates (later known as Audience Research and Development) of Dallas, Texas, a media consulting firm retained by KMBC, supplied a tape of plaintiff's work in Santa Barbara. Based on his review of many tapes, Shannon contacted several individuals, including plaintiff, to ascertain who was interested in and available to audition for the new co-anchor position. During their first telephone conversation in November of 1980, plaintiff told Shannon she was interested in the position so long as it did not involve a "makeover" of her appearance, such as she had experienced at CBS. Following further discussions, it was agreed that plaintiff would come to Kansas City for an audition, which occurred in late November, 1980. During renewed discussions about the nature of the job and the issue of plaintiff's appearance, Shannon explained the station had consultants who worked with on-air personnel in various areas, including delivery, clothing, and makeup. Plaintiff acknowledged her lack of expertise in matters of makeup and hair and indicated her willingness to work on her appearance with a consultant.

At the conclusion of the interview and audition, plaintiff was offered the position at a salary of $28,000. She returned to California with a copy of defendant's standard

contract for personal services. Shannon and Replogle had advised plaintiff to review the contract with her attorney, and plaintiff contacted her friend, Robert Hamilton, an attorney and writer who had previous experience negotiating contracts for personal services.

In the weeks that followed, Hamilton negotiated with Shannon on behalf of plaintiff, with the following results: First, the term of the contract was reduced from three years to two years. Second, plaintiff's salary was increased to $35,000 during the first year and $38,500 during the second year. Third, the standard provision permitting defendant to terminate the contract at the end of each thirteen-week cycle was deleted; in lieu thereof, defendant retained the right to terminate the contract after twelve, eighteen, and twenty-four months, thereby giving plaintiff greater job security. On the other hand, defendant rejected Hamilton's request that plaintiff's position be specifically described as co-anchor; instead, the standard language describing her position as staff announcer and permitting defendant to reassign her remained in the contract. Defendant also refused to include a clothing allowance in the contract as requested by Hamilton.

Counsel for defendant revised the standard contract to include the modifications described above. Copies of the contract were presented to plaintiff for execution sometime after she commenced her duties at the station; management again suggested the contract should be reviewed by her attorney. After approximately three weeks on the job as co-anchor, plaintiff signed the contract on January 22, 1981, without reading it in detail and without consulting an attorney.

Plaintiff had moved to Kansas City in mid-December 1980. At the direction of Shannon, she traveled via Dallas,

Texas, where she stopped and met with Lynn Wilford of the Media Associates. They evaluated plaintiff's abilities and discussed effective news presentation. At the request of Shannon, Wilford kept discussion of plaintiff's appearance to a minimum.

Plaintiff began working at the station in late December, 1980. During a short transitional period, plaintiff did some reporting and promotional work so that viewers would become acquainted with her. It was also necessary for plaintiff to familiarize herself with certain technical aspects of the KMBC news operation. She began as co-anchor on January 5, 1981; to further ease the transition for plaintiff and the viewing audience, Shannon directed the news producer to assign the "lead-in" or first news story of each broadcast to Feldman about two-thirds of the time and to plaintiff about one-third of the time. This allocation continued for a few weeks; thereafter, lead stories were allocated equitably between Feldman and plaintiff.

Soon after plaintiff began her duties as co-anchor, it became apparent to Shannon and Replogle that on several occasions plaintiff's on-air makeup and clothing were inappropriate. Shannon commented to plaintiff several times early in her employment that she should dress more conservatively and use makeup properly. He arranged for Lynn Wilford to come to Kansas City on January 14, 1981, to assist plaintiff in improving her appearance. During this visit, Wilford worked on plaintiff's wardrobe and makeup. In subsequent periodic visits to the station, Wilford continued these efforts, achieving only modest success.

During her initial months of employment, plaintiff had considerable discretion in the selection of her on-

air clothing. Although Shannon made occasional suggestions or criticisms as to the appropriateness of certain pieces of clothing, neither he nor any other representative of defendant mandated that plaintiff observe any strict dress code during her first months at the station. Beginning in April, 1981, KMBC arranged for Macy's Department Store to provide clothing for plaintiff in exchange for advertising time. Maureen Shawver, a clothing consultant from Macy's, assisted plaintiff in making clothing selections. In addition, Wilford reviewed videotapes of plaintiff in various outfits. Plaintiff was not ordered to wear any of the clothes selected, and in fact she rejected several items suggested by Shawver.

On May 19 and 20, 1981, Steven Meacham of the Media Associates conducted four focus group discussions to learn how television viewers perceived KMBC's news program. A focus group is an accepted research technique whereby a small group of individuals with similar demographic characteristics meet to discuss a given subject, in this instance television news in Kansas City. A focus group does not product scientifically reliable results because of the small statistical sample; however, it may suggest possible trends and areas for further research.

Meacham acted as moderator of the focus group discussions. Many topics were discussed, and the participants reviewed sample videotapes of local news programs. The response to plaintiff, and in particular to her appearance, was overwhelmingly negative. During the course of these discussions, and after the participants' attitude toward plaintiff had become apparent, Meacham on more than one occasion made derogatory remarks about plaintiff. Although his comments may have been indecorous and ill-advised, it is clear from listening to the tapes that they

were made after the attitude of the group had been made very clear and they did not influence the opinions held by focus group participants.

Station management observed the focus groups from behind a one-way mirror. Shannon and Replogle met with plaintiff on May 21, 1981, to discuss the results and possible responses. Replogle advised plaintiff that there seemed to be some problems with her acceptance by the Kansas City viewing audience, but he indicated that management was ready to work with her to overcome those problems. Plaintiff at first said she wanted to be let out of her contract so that she could return "home" to California. Replogle reiterated defendant's desire to retain plaintiff's services and to work with her to overcome the negative audience response. Plaintiff eventually agreed to cooperate with defendant in that endeavor. Replogle stated that defendant would be instituting a clothing calendar for plaintiff. She agreed to follow the calendar when she received it. Thereafter, plaintiff's wardrobe was more closely supervised, but the clothing calendar was not formally instituted until late July or early August a few weeks before plaintiff was removed as co-anchor.

As a follow-up to the focus groups, Media Associates conducted a telephone survey in late June, 1981, of the attitudes of four hundred randomly selected individuals residing in the greater Kansas City viewing area. All persons and organizations involved in the construction, administration, and analysis of the survey were experienced in market and broadcasting research. The survey measured the attitudes of Kansas City television viewers toward a wide range of selected aspects of television news in Kansas City. The questionnaire was drafted by Steven Meacham and revised by station management and

included questions on various issues raised by the focus group participants, including plaintiff's dress and appearance. The questionnaire asked questions from both sides of the appearance and dress issues for plaintiff, in an attempt to see if persons surveyed perceived as strengths those qualities which the focus groups perceived as drawbacks. The questionnaire was administered during long-distance telephone interviews by trained employees of Weise, Rozmarin & Associates of Omaha, Nebraska. Weise, Rozmarin used accepted quality control procedures in validating the interviewers' work and the data entered for computer analysis. The data was processed with the commonly used Statistical Program for the Social Sciences and was generated in the form of a computer print-out with indexed tables. Weise, Rozmarin forwarded the data to Media Associates in Dallas. The survey was conducted in accordance with generally accepted principles of survey research, and its results are trustworthy; moreover, defendant's reliance on those results was reasonable and appropriate. Plaintiff's attempt to question the validity of the survey research through the testimony of Thomas Beisecker, an Associate Professor of Communications Studies at the University of Kansas, was not persuasive. He conceded the telephone survey was not sex-biased and he lacked credentials and experience in the area of broadcasting research.

Shannon and Replogle received the final results of the June telephone survey on about August 3, 1981. The report concluded that plaintiff was having an extremely adverse impact on defendant's acceptance among Kansas City viewers. In the survey, plaintiff was compared to the female co-anchors at WDAF and KCMO and was found to be the least popular and least accepted of the three in almost every category. Comparisons were made pri-

marily to Anne Peterson, who co-anchored at KMBC's primary competitor, KCMO. In virtually every comparison with Peterson, plaintiff trailed. On August 13, 1981, Shannon and Replogle met with consultants from Media Associates, who recommended that plaintiff be replaced immediately. Shannon and Replogle initially resisted the suggestion, but after discussing the matter in Replogle's office the next morning, Friday, August 14, they agreed to remove plaintiff as co-anchor and to reassign her to the position of general assignment reporter at no loss in pay or other contractual benefits. Shannon decided he would tell plaintiff of the decision to reassign her when she came to work at 2:30 p.m. After finishing his discussion with Replogle, which lasted most of the morning, Shannon went to his office in the newsroom. Shortly thereafter, he encountered plaintiff, who had come to work early to edit a story. Since she would soon be leaving for an interview, Shannon decided to inform her of the reassignment immediately. At his request, plaintiff entered Shannon's office. During the discussion that followed, only the two of them were present and the door to Shannon's office was closed.

Shannon began by reminding plaintiff of their previous discussions about her appearance and on-air stumbling and their attempts to overcome those obstacles. Referring to the recent research, he said that these factors had created a wall between plaintiff and viewers and that she was being removed as co-anchor and reassigned as a general assignment reporter. Plaintiff asked why she was being reassigned, and in response, Shannon turned to a cabinet behind hi[illegible]k in which he had placed the Media Associates' rep[illegible]rt. He picked it up and said that the results of the research were devastating and unprecedented in the history of Media Associates. Shannon said that the

report proved that the audience perceived plaintiff's dress, appearance, makeup, and presentation as stumbling blocks. Further, Shannon said that the report showed that female viewers were leaving KMBC for its closest competitor, KCMO. Although Shannon told plaintiff that defendant intended to honor its contractual obligation to her, plaintiff said that she was going home to Santa Barbara. Shannon encouraged plaintiff to stay on as a reporter and suggested she take the weekend off to consider the matter. Before leaving Shannon's office, plaintiff indicated that she did not think she would change her mind about leaving. At no time during their discussion on August 14, 1981, did Shannon tell plaintiff she was being reassigned because she was too old, too unattractive, and not deferential enough to men or that she was being reassigned because the audience so perceived her.

Over the weekend, plaintiff discussed her situation with several persons, including her attorney Robert Hamilton and a local newspaper reporter. On the following Monday, August 17, 1981, she sent a telegram to defendant reiterating her decision not to accept a reassignment. During this same period, Hamilton telephoned Shannon several times to urge him to reinstate plaintiff as co-anchor. When Shannon refused, Hamilton on one occasion lost his temper and threatened to make the matter a "cause celebre." A meeting on Tuesday, August 18, 1981, between plaintiff, Shannon, and Replogle at the Kansas City Club, called by defendant in an attempt to resolve the matter amicably, ended in an impasse.

When Shannon arrived at work on Monday, August 24, 1981, he found the clothes defendant had bought for plaintiff on the couch in his office and plaintiff's key to the station on his desk. Plaintiff appeared at the station

about 8:45 a.m. that morning and informed Shannon she was reporting to work as a co-anchor. He responded that she could work as a reporter. Plaintiff said "good-bye" and left, returned to her apartment and drove to Santa Barbara, California, a few days later. On September 1, 1981, plaintiff commenced work as co-anchor at KEYT in Santa Barbara, a job she still held at the time of trial.

KMBC management was concerned about the appearance of all its on-air personnel, both male and female. Management expected grooming and dress to be consistent with community standards; on-air personnel understood the need to maintain a professional and business-like appearance. Whenever an appearance problem was detected, management responded with measures appropriate to the individual situation. Plaintiff received counseling in clothing and makeup, areas in which she acknowledged her lack of expertise. When it later became apparent that additional measures were needed to correct the problems, clothing was acquired from Macy's and a clothing calendar was instituted.

Pam Whiting, the weekend co-anchor during most of the time plaintiff was weeknight co-anchor, is another example of management's individualized response to appearance problems. Like plaintiff, Whiting, whose prior employment was limited to radio, was inexperienced in the use of appropriate television makeup; therefore, consultants were used to educate her in makeup techniques. Clothing was also an occasional problem, but the circumstances did not warrant a clothing calendar or routine purchase of clothing for Whiting. Unlike plaintiff, Whiting also had problems with her weight and her hairstyle; therefore, individualized analysis and recommendations were made in those areas.

Brenda Williams has been employed at KMBC since 1977 in various positions, including weekend anchor and reporter, and Williams was selected to replace plaintiff as weeknight co-anchor in September, 1981. Williams' appearance was always satisfactory to defendant, and no corrective measures were ever necessary.

Defendant also gave individualized attention to the appearance of male on-air personnel. The appearance of co-anchor Scott Feldman was generally satisfactory; however, on at least two occasions, he received specific directives regarding his choice of shirts. Shannon and Wilford told Mike Placke, the weekend weatherman, to lose weight and improve his wardrobe; he followed those suggestions. Wilford suggested that Bob Werley, a reporter, blow dry his hair, try contact lenses, and change his on-air make-up. Werley took the advice although he discovered that he could not wear contact lenses, so he changed his make-up to improve his appearance with glasses. Michael Mahoney, a reporter, was told that he needed to lose weight and improve his wardrobe; he did so. In addition, Mahoney occasionally experienced a nervous twitch in his mouth, which resembled a sneer. Management attempted to assist him in overcoming this problem. Shannon told Tim Richardson, a noon newscaster and reporter, to change his hairstyle; Richardson complied.

Newsroom operations were conducted without regard to sex, consistent with defendant's policy of equal co-anchors. After the first few weeks of plaintiff's performance as co-anchor, lead-in stories were equitably distributed between plaintiff and her co-anchor, Scott Feldman. Other job assignments which plaintiff considered desirable, including on-site reporting and "hard" news stories, were also equitably distributed, as were less desir-

able duties such as "news teases" (short promotional segments taped at about 4 p.m.), to the extent possible given the exigencies of the newsroom. On one occasion, in March, 1981, Shannon reprimanded Feldman for referring to plaintiff as "that girl," telling Feldman that such conduct would not be tolerated. As plaintiff testified, "Ridge reprimanded Scott for using that type of language and told both of us we were co-equal, we were co-anchors and he would not tolerate that sort of language."

Although Feldman was paid more than plaintiff, the differential was based on factors other than sex. Feldman had an education in broadcasting, several years of experience as a news anchor in major television markets prior to coming to Kansas City in 1978, and was well established in the Kansas City market by the time plaintiff arrived in 1981. On the other hand, plaintiff had no formal education in broadcasting, her experience as a news anchor was limited to small television markets, and she was unknown to Kansas City viewers.

Ratings, or measurements of the size of the viewing audience, are very important in the television industry because they have a direct effect on a station's advertising revenue. Two private companies, Arbitron and Nielsen, issue ratings several times a year. Ratings measure audience behavior by ascertaining the number of persons actually tuned to a given station. In contrast, audience research, such as that conducted by Media Associates, measures attitudes in an attempt to explain and forecast the ratings. Audience research enables station management to adjust its programming to increase, or at least to maintain, its share of the audience.

The results of the audience research have been previously summarized. In addition, both parties introduced

considerable evidence on KMBC's ratings before, during, and after plaintiff's tenure at the station. This evidence was equivocal at best and is of no particular assistance to the court in resolving the issues raised under Title VII since defendant removed plaintiff as co-anchor based on research showing negative viewer attitudes toward plaintiff which could be expected to result in an eventual erosion of defendant's ratings. The July, 1981, ratings were unavailable and unknown to defendant when plaintiff was removed as co-anchor; therefore, whether those ratings ultimately went up or down is simply irrelevant to the issue of sex discrimination. Even assuming the ratings improved during and immediately after plaintiff's tenure, that would simply mean that defendant and its consultants erred in their predictions, and such evidence would not support an inference of sex discrimination.

In summary, plaintiff was not discriminated against because of her sex. The measures taken by defendant with respect to her appearance were necessary and appropriate considering her individual shortcomings. Plaintiff's salary was determined on the basis of factors other than sex. Plaintiff was not constructively discharged since defendant did not render her working conditions intolerable, and they were not, in fact, intolerable. Plaintiff voluntarily resigned rather than accept a reassignment pursuant to the terms of her contract. Accordingly, she suffered no damages attributable to any wrongful act of defendant.

B. Conclusions of Law

Defendant is an employer within the meaning of 42 U.S.C. § 2000e(b). The court has jurisdiction over the parties and subject matter jurisdiction of this action under 28 U.S.C. § 1343(a)(4) and 42 U.S.C. § 2000e-5(f)(1).

42 U.S.C. § 2000e-(2)(a) provides in part that it shall be an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."

Plaintiff makes essentially three claims of sex discrimination. She first asserts discrimination in the terms and conditions of her employment; specifically, she complains that she was subjected to a rigorous dress code and constant criticism of her appearance while her male counterparts received no such treatment. Plaintiff's second complaint of sex discrimination concerns her removal as co-anchor; she claims that defendant's explicit and implicit reasons for removing her were based on sex and that defendant's actions amounted to a constructive discharge. Finally, plaintiff asserts that she was paid less than Scott Feldman because of her sex. With respect to all of her claims under Title VII, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981).

Plaintiff's first claim of sex discrimination based on defendant's actions with respect to her appearance must be analyzed both in terms of theory and practice. To the extent that plaintiff might argue that Title VII absolutely prohibits an employer from imposing reasonable but different standards of appearance for males and females, such a position must be rejected as contrary to the overwhelming weight of authority. Title VII "was never intended to interfere in the promulgation and enforcement of personal appearance regulations by private employers." *Knott v. Missouri Pacific Railroad Co.,* 527

F.2d 1249, 1251-52 (8th Cir. 1975). "[A] private employer may require male employees to adhere to different modes of dress and grooming than those required of female employees and such does not constitute an unfair employment practice within the meaning of 42 U.S.C. § 2000e-2(a)." *Baker v. California Land Title Co.*, 507 F.2d 895, 898 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975). *See also Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755-56 (9th Cir. 1977) (citing cases).

The courts which have considered this issue have taken a realistic and common-sense approach. For instance, in *Fagan v. National Cash Register Co.*, 481 F.2d 1115 (D.C. Cir. 1973), the court stated:

> Perhaps no facet of business life is more important than a company's place in public estimation. That the image created by its employees dealing with the public when on company assignment affects its relations is so well known that we may take judicial notice of an employer's proper desire to achieve favorable acceptance. Good grooming regulations reflect a company's policy in our highly competitive business environment. Reasonable requirements in furtherance of that policy are an aspect of managerial responsibility.[1]

Id. at 1124-25. Judge Collinson of this district has taken a similar approach:

> Employment decisions . . . based on either dress codes or policies regarding hair length are more closely related to the company's choice of how to run its business rather than to its obligation to provide equal

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1. It is well recognized that Title VII "was not intended to 'diminish traditional management prerogatives.'" *Burdine*, 450 U.S. at 259.

> employment opportunities. The decision to project a certain image as one aspect of company policy is the employer's prerogative which employees may accept or reject. If they choose to reject the policy, they are subject to such sanctions as deemed appropriate by the company. An employer is simply not required to account for personal preferences with respect to dress and grooming standards.

Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388, 1392 (W.D. Mo. 1979). *See also Willingham v. Macon Telegraph Publishing Co.,* 507 F.2d 1084, 1091 (5th Cir. 1975) (en banc).

Thus, defendant's standards of appearance for its on-air personnel can in no way be considered discriminatory per se. Both men and women were required to maintain a professional, business-like appearance consistent with community standards. Since television is a visual medium, as plaintiff admitted in her testimony, such a reasonable requirement is obviously critical to defendant's economic well-being.

Plaintiff's claim of sex discrimination is also based on defendant's standards of appearance as applied. She contends that defendant routinely and rigorously enforced dress and makeup requirements for women but not for men. This court recognizes that otherwise permissible appearance and grooming standards could be unlawful if invidiously applied. *See Knott,* 527 F.2d at 1252 (upholding validity of reasonable grooming and appearance standards when "imposed in an evenhanded manner on all employees"). Ultimately the issue is a matter of proof, and the evidence fails to sustain plaintiff's position.

An individual's appearance is a unique and often sensitive matter. Television by its nature requires station man-

agement to exercise special supervision over matters of personal appearance, yet it was apparent at trial that KMBC management found it preferable and politic to permit on-air personnel to operate within rather general appearance guidelines to the extent feasible considering the skill and judgment of each employee. Many employees, both male and female, demonstrated a fairly consistent ability to maintain their appearance at a level acceptable to management; therefore, little or no supervision or criticism was necessary. Other employees, also of both sexes, had more difficulty maintaining their appearance. Plaintiff was one of these; therefore, management found it necessary to offer criticism, advice, and assistance, tailored to fit her individual needs.

In plaintiff's particular case, management had to contend with several factors. First was plaintiff's highly visible role as co-anchor, which meant that the fortunes of KMBC were linked to the impression plaintiff left with viewers. Second was plaintiff's below-average aptitude in matters of clothing and makeup. Third was plaintiff's attitude that her appearance was not critical to her success as an anchor, an attitude directly opposite to that of management. The final factor was plaintiff's acute sensitivity to management's efforts to improve her appearance. Faced with this unique and difficult situation, management responded cautiously and gradually. With the assistance of consultants, defendant first attempted to teach plaintiff the necessary skills in makeup and clothing. When this diplomatic approach proved ineffective, the next step was to acquire clothing for plaintiff and to suggest how it should be worn. Finally, management found it necessary to implement a clothing calendar and to monitor plaintiff's appearance closely.

Defendant's responses to the appearance problems of other employees, both male and female, do not support an inference of discrimination. If anything, that evidence shows a consistent concern by management over the appearance of all on-air personnel without regard to sex but with regard to the peculiar characteristics of each employee. Plaintiff was an employee of atypical aptitudes and attitudes, and defendant merely acted to correct appearance problems which plaintiff was unable or unwilling to remedy. The actions taken by defendant in regard to plaintiff's appearance were not the result of any general animus toward women or of any specific animus toward plaintiff as a woman. It may well be that in plaintiff's case some of the steps taken by management were unprecedented, but they were not ipso facto discriminatory.

Plaintiff's second claim of sex discrimination concerns her removal as co-anchor. Insofar as this claim is based on the much-publicized litany—"too old, too unattractive, and not deferential enough to men"—allegedly uttered by Shannon on August 14, 1981, it is rejected since this court has concluded as a matter of fact that Shannon said no such thing.

Plaintiff also contends that discrimination can be inferred from the circumstances surrounding her removal as co-anchor; however, she has not sustained her burden of proof on this contention. Defendant's reliance on the results of the telephone survey conducted by Media Associates was not pretextual and was in fact the reason plaintiff was reassigned. The survey was a routine procedure designed to evaluate many facets of the KMBC news operation and was conducted, tabulated, and evaluated by persons experienced in the field of broadcast research. There is simply no evidence that the survey was

designed to effect the removal of plaintiff as co-anchor because of her sex or any other reason: even plaintiff's expert conceded the survey was not sex-biased. Under these circumstances, defendant was entitled to rely on the results of the survey.

Plaintiff suggests an inference of sexual animus can be drawn by contrasting the consultant's report to the ratings from the same period; however, even assuming the ratings unequivocally showed KMBC to be in first place just prior to plaintiff's removal as co-anchor, a more plausible inference is that television research is an inexact science. It might also be argued broadly that defendant should not have relied on the consultant's report as a basis for removing plaintiff as co-anchor, but this is a normative issue not properly before the court under Title VII:

> The news business may indeed have its quirks and vagaries, in this age when the selection of a new anchor for the CBS evening news is itself front-page news, but consultant's reports and ratings routinely serve as the basis for personnel changes. Furthermore, the ratings and the report provided strong evidence in support of the defendant's decision.

Haines v. Knight-Ridder Broadcasting, Inc., 25 Empl. Prac. Dec. (CCH) ¶ 31,650 (D.R.I. July 3, 1980).

As part of the claim arising out of her removal as co-anchor, plaintiff also contends that she was constructively discharged because of her sex. This contention is untenable on both the law and the facts. "Generally, a constructive discharge occurs when an employer deliberately makes or allows the employee's working conditions to become so intolerable that the employee has no other choice but to quit." *Irving v. Dubuque Packing Co.*, 689

F.2d 170, 172 (10th Cir. 1982). "To constitute a constructive discharge, the employer's actions must have been taken with the intention of forcing the employee to quit." *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981). Here the evidence does not support a finding that plaintiff's working conditions became so intolerable that she had no choice but to quit; moreover, there is no evidence that any of the actions by defendant were taken with the intent to force plaintiff's resignation. On the contrary, it appears that defendant repeatedly expressed its desire to retain plaintiff first as co-anchor and later as a reporter.

Plaintiff's last claim under Title VII is simply a reprise of her Equal Pay Act claim. The jury found against her on that claim, and elsewhere this court has refused to disturb that finding. *See* Section II, *infra*. It would therefore be entirely inappropriate to reconsider the matter under Title VII since the jury found the defendant had established a defense under the Equal Pay Act. *See Orahood v. Board of Trustees*, 645 F.2d 651, 654 n.3 (8th Cir. 1981) ("a defendant who establishes one of [the four affirmative defenses in the Equal Pay Act] cannot be held liable under either Title VII or the Equal Pay Act"). Even assuming plaintiff's pay claim could now be considered under Title VII, the evidence demonstrated that the difference in pay between plaintiff and Scott Feldman was attributable to several factors other than sex, particularly education and experience.

In summary, defendant's actions toward plaintiff during her employment at KMBC were not based on her sex—with one notable and ironic exception: but for the fact that she is a female, plaintiff would not have been hired as a co-anchor in December, 1980, regardless of her

other abilities. Thereafter, defendant's treatment of plaintiff was the result of the factors other than sex. Her salary was less than that of Scott Feldman not because she was a woman but because her education and experience were not commensurate with his. She was a "co-equal co-anchor," and newsroom operations were conducted without regard to sex. Her affinity for the casual beach life and her apparent indifference to matters of appearance required defendant to formulate and implement corrective measures appropriate to her unique circumstances. Defendant reassigned plaintiff because properly conducted audience research demonstrated unprecedented negative viewer response toward her. She was not constructively discharged; rather, she voluntarily left KMBC rather than abide by the terms of a contract which she had signed but never carefully reviewed.

II. EQUAL PAY ACT CLAIM

The jury returned a verdict for defendant under Count II, the Equal Pay Act claim, and plaintiff has moved for a new trial.

A review of the suggestions filed in support of the motion fails to convince the court that the verdict on Count II should be disturbed. Contrary to plaintiff's assertion, the verdict was not against the clear weight of the evidence. Plaintiff's allegations of instructional error on Count II are not well taken. Finally, the court adheres to its previous rulings on the admission and exclusion of evidence concerning the compensation of other KMBC employees.

III. FRAUD CLAIM

On plaintiff's claim of fraud under Count III, the jury awarded actual damages of $375,000 and punitive

damages of $125,000. Defendant now seeks judgment notwithstanding the verdict or a new trial or remittitur. Defendant has filed extensive suggestions in support of its motion, and plaintiff has responded in kind.

At the outset, it is apparent that the motion for judgment notwithstanding the verdict should be denied. Technically, it is merely a renewal of the motion for directed verdict made at the close of all the evidence. *Johnson v. Rogers,* 621 F.2d 300, 305 (8th Cir. 1980). In this case, the motion for directed verdict was denied after extensive post-trial briefing and argument. *Order of August 31, 1983.* A motion for judgment notwithstanding the verdict "can be granted only if the motion for directed verdict should have been granted." *Walker v. KFC Corp.,* 515 F. Supp. 612, 615 (S.D. Cal. 1981). Defendant has not convinced this court that a directed verdict should have been granted; therefore, the motion for judgment notwithstanding the verdict will be denied.

This court has greater latitude in considering defendant's alternative motion for a new trial: "Rule 59 gives the trial judge ample power to prevent what he considers to be a miscarriage of justice. It is his right, and indeed his duty, to order a new trial if he deems it in the interest of justice to do so." 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2803 (1973). A new trial may be ordered for a great variety of reasons:

> It has been said that the general grounds for a new trial are that the verdict is against the weight of the evidence, that the damages are excessive, or that for other reasons the trial was not fair, and that the motion may also raise questions of law arising out of substantial errors in the admission or rejection of evidence or the giving or refusal of instructions.

Id. § 2805. *See also Fireman's Fund Insurance Co. v. Aalco Wrecking Co.*, 466 F.2d 179, 187 (8th Cir. 1972) (court may order new trial if first trial resulted in a miscarriage of justice), *cert. denied*, 410 U.S. 930 (1973). "[W]here the trial court finds the verdict contrary to the weight of the evidence and grants a new trial . . . the appellate court should 'exercise a closer degree of scrutiny and supervision . . . in order to protect the litigants' right to jury trial.'" *Id.*, 466 F.2d at 187 (quoting *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90 (3rd Cir.), *cert. denied*, 364 U.S. 835 (1960)). On the other hand:

> When evidence is erroneously admitted or excluded or where the trial court has erred in the instructions to the jury, the trial court is considered in a better position to correct a manifest injustice in ruling on the motion for new trial. Under these circumstances the grant of the new trial does not interfere with the role of the jury as the trier of fact.

Fireman's Fund, 466 F.2d at 186. The trial court is also in the best position to determine whether the verdict is excessive; it is the opinion of the Eighth Circuit that

> inadequacy or excessiveness of a verdict is basically, and should be, a matter for the trial court which has had the benefit of hearing the testimony and of observing the demeanor of the witnesses and which knows the community and its standards; that this is a responsibility which, for better working of the judicial process and for other seemingly obvious reasons, is best placed upon its shoulders; and that we shall continue to consider review, as we have said before, not routinely and in every case, but only in those rare situations where we are pressed to conclude that

there is a "plain injustice" or a "monstrous" or "shocking" result.

Nodak Oil Co. v. Mobil Oil Corp., 533 F.2d 401, 410 (8th Cir. 1976) (quoting *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 447-48 (8th Cir.), *cert. denied*, 368 U.S. 929 (1961)).

The jury awarded plaintiff $375,000 in actual damages and $125,000 in punitive damages. The court is firmly convinced that this verdict is excessive and is the result of passion, prejudice, confusion, or mistake on the part of the jury. It is telling to note that plaintiff prayed for $200,000 in actual damages in her complaint and her counsel asked for $75,000 to $100,000 in actual damages in closing argument, yet the jury awarded $375,000. Although the award of punitive damages was within the amount specified in the prayer and closing argument, the jury's unprincipled award of actual damages makes the award of punitive damages inherently suspect.

Instructional errors may be in part responsible for the excessive award. Prior to trial, the court announced that the issue of punitive damages would be submitted, if at all, only after a finding of liability. The goal of this bifurcated procedure was to focus the jury's attention first on the question of liability in order to promote a more reasoned analysis of the case. Unfortunately, the issue of punitive damages was not expressly withdrawn from the jury when the case was first submitted, and it is apparent that the award of "compensatory" damages contains a substantial, but undefined, punitive element. On retrial, the submission of damages will again be bifurcated; however, the issue of punitive damages will be expressly withdrawn from the jury during its initial deliberations to eliminate the risk of jury confusion or mistake.

Another instructional shortcoming concerns the issue of wrongful discharge. In a case such as this, it is important that the jury not be given a roving commission to second-guess defendant's managerial decisions. Defendant submitted a proposed instruction to withdraw from the jury any consideration of the general fairness or reasonableness of defendant's actions toward plaintiff. Although the court was amendable to such an instruction in theory, defendant's proposal was unsatisfactory as were attempts to revise it. The proposed instruction was also rejected in favor of Instruction No. 12, which expressly withdrew wrongful discharge and related issues from the jury under Count I. However, a review of the instructions as a whole now convinces the court that wrongful discharge and related issues were not clearly withdrawn from the jury's consideration, particularly with respect to Count III. It is therefore quite possible that the jury was confused or mistaken as to the applicable law, and a new trial is appropriate.

In addition to the mistake and confusion possibly created by the instructions, the excessive verdict is also certainly attributable to passion and prejudice caused by the pervasive publicity surrounding this case. News reports and commentary on the circumstances surrounding plaintiff's departure from KMBC began within days after she was removed as co-anchor and increased as trial approached. The effect of this pretrial publicity was explored during voir dire, but the news coverage of course continued after the jury was impaneled. Although the jury was repeatedly admonished not to discuss the case with anyone and to disregard news accounts of the trial, even the most conscientious juror would have been unable to ignore the pervasive and relentless publicity and could not have been immune from its effect.

In support of its motion for new trial, defendant has filed two volumes which contain only a sampling of the local and national coverage of the case by newspapers and wire services. In addition, the trial received obsessive attention from local television stations and the national networks. Although cameras were not allowed in the courtroom, television crews were frequently stationed at the perimeter of the building, recording the comings and goings of trial participants. Present each day in the gallery were courtroom artists and a substantial number of reporters, including some whose faces were undoubtedly well known to the jurors. During closing arguments, the gallery was literally crammed to capacity.[2] The news accounts resulting from all this attention in most instances described the case in terms of plaintiff's prayer for $1.2 million in damages and her allegation that defendant told her she was "too old, too unattractive, and not deferential enough to men." The ceaseless incantation of these allegations worked to the advantage of plaintiff and to the serious detriment of defendant.

Consistent with the customary practice in civil cases in this district, the jury was never sequestered. The court is firmly convinced that, as a result, the jury became so infected with passion and prejudice that it was unable to discharge its duty of fairness to both parties. Upon retrial, the jury will be sequestered to assure both parties an impartial jury.

Two additional measures will be taken to ensure the integrity of the jury. First, the case will be retried to

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2. By an unfortunate circumstance of timing, the jury retired to deliberate late on a Friday afternoon. Deliberations were recessed over the weekend, thereby increased the risk that the jury was exposed to prejudicial publicity at a crucial point in the trial.

a jury of twelve. *See* Local Rule 14C. See also 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2491 (1971 & Supp. 1982). This should reduce the risk that one or two headstrong jurors might unduly influence the jury and should increase the chances that reason will prevail over passion. Second, the case will be retried in Joplin, Missouri, in the Southwestern Division of this District. Moving the case away from Kansas City should reduce the level of trial publicity and make it more likely that the jury can reach a decision based solely on the evidence presented in court. In addition, jury selection should be easier since it is less likely that prospective jurors in the Southwestern Division will have been exposed to the intense publicity which emanated from Kansas City during the first trial.

Because of the excessive verdict attributable to incomplete instruction of the jury and to incessant and overwhelming trial publicity, a new trial on all issues raised under Count III is required. Reduction of the damage award by remittiture is inappropriate because passion and prejudice influenced not only the jury's calculation of damages but also its decision on the threshold issue of liability. *See Richardson v. Communications Workers of America,* 530 F.2d 126, 129 (8th Cir.) (in excessive verdict cases, decision whether to reduce verdict or grant new trial is primarily for trial court), *cert. denied,* 429 U.S. 824 (1976).

IV. CONCLUSION

For the reasons stated, it is

ORDERED that judgment is entered in favor of defendant and against plaintiff on Count I of her complaint. It is further

ORDERED that plaintiff's Motion for a New Trial on the Equal Pay Act Claim is denied. It is further

ORDERED that defendant's alternative motions for judgment notwithstanding the verdict or for remittitur on Count III are denied. It is further

ORDERED that defendant's alternative motion for a new trial on Count III is granted. Retrial of all issues raised under Count III will begin at 9:30 a.m. on Wednesday, January 4, 1984, at the Federal Courthouse in Joplin, Missouri; a jury of twelve will be impaneled and will be sequestered throughout the proceedings. It is further

ORDERED that no later than Friday, November 18, 1983, each side shall file suggestions concerning the most appropriate method by which to conduct an orderly, efficient, and searching voir dire of prospective jurors. It is further

ORDERED that proposed jury instructions shall be filed no later than Friday, December 9, 1983.

/s/ Joseph E. Stevens, Jr.
Joseph E. Stevens, Jr.
United States District Judge

October 31, 1983

(Filed January 13, 1984)

JUDGMENT IN A CIVIL CASE
UNITED STATES DISTRICT COURT
Western District of Missouri,

83-0007-CV-W-8

Christine Craft-

V.

Metromedia, Inc.
Honorable Joseph E. Stevens, Jr.

[X] Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[ ] Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

on the claim of Plaintiff Christine Craft against Defendant Metromedia, Inc., for fraudulent representations, judgment is hereby entered in favor of Plaintiff and against Defendant, with actual damages assessed at Two Hundred Twenty-five Thousand ($225,000) Dollars and punitive damages assessed at One Hundred Thousand ($100,000) Dollars.

R. F. Connor
Clerk
/s/ (Illegible)
(By) Deputy Clerk

January 13, 1984

(Filed January 17, 1984)

IN THE UNITED STATES DISTRICT COURT
For the Western District of Missouri
Western Division

No. 83-0007-CV-W-8

CHRISTINE CRAFT,
Plaintiff,

vs.

METROMEDIA, INC.,
Defendant.

ORDER

Prior to submission of plaintiff's fraud claim, the court deferred a ruling on defendant's motion for directed verdict at the close of all the evidence. Rule 50(b) provides that "[w]henever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." Rule 58 provides that "upon a general verdict of a jury . . . the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court."

It appears to the court that under Rule 50(b) deferral of defendant's motion for directed verdict was tantamount to a denial thereof, and the clerk of the court routinely enters judgment as of the date of the verdict. Therefore, it appears that the time for filing motions under Rules

50(b) and 59(b) began to run at the time of verdict; moreover, Rule 6(b) prohibits the court from extending the time for filing such motions. Accordingly, in the interest of clarity; it is

ORDERED that defendant's motion for directed verdict at the close of all the evidence shall be deemed denied as of January 13, 1984.

/s/ Joseph E. Stevens, Jr.
Joseph E. Stevens, Jr.
United States District Judge

January 17, 1984

(Filed February 7, 1984)

IN THE UNITED STATES DISTRICT COURT
For the Western District of Missouri
Western Division

No. 83-0007-CV-W-8

CHRISTINE CRAFT,
Plaintiff,

vs.

METROMEDIA, INC.,
Defendant.

ORDER

Pursuant to the order of October 31, 1983, a new trial on plaintiff's fraud claim commenced in Joplin, Missouri, on January 4, 1984. On January 13, 1984, the sequestered jury of twelve found in favor of plaintiff and awarded her $225,000 in actual damages and $100,000 in punitive damages. Defendant has now filed its Motion for Judgment Notwithstanding the Verdict and Motion for New Trial as to Count III, to which plaintiff has responded.

Defendant's motion contains eighty-seven allegations of error (plus subparts), each of which defendant asserts constitute prejudicial and plain error warranting judgment notwithstanding the verdict, or alternatively, yet another trial. Having reviewed this compendium of alleged errors, the court finds no sufficient reason to disturb the verdict.

In addition, the court is satisfied that the problems with the first trial, as described in the order of October 31, 1983, did not reoccur in the Joplin trial. The instructional

errors on wrongful discharge and punitive damages were corrected in the second trial, and the potential prejudicial impact of trial publicity on the jury was minimized or eliminated by sequestration and the increased number of jurors.

Therefore, it is

ORDERED that defendant's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial as to Count III is denied. It is further

ORDERED that costs will be taxed as follows:

1. Each side will bear its own costs incurred up to and including August 8, 1983, the date of verdict in the first trial.

2. All costs incurred after August 8, 1983, will be taxed to defendant.

/s/ Joseph E. Stevens, Jr.
Joseph E. Stevens, Jr.
United States District Judge

February 7, 1984

IN THE UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 84-1336
No. 84-1380

CHRISTINE A. CRAFT,
Appellee/Cross-Appellant,

vs.

METROMEDIA, INC.,
Appellant/Cross-Appellee.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

The Seventh Amendment to the United States Constitution declares:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the *right of trial by jury shall be preserved*, and *no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of common law.*

Christine Craft petitions for rehearing or suggests rehearing en banc, because the panel opinion handed down in this case simply is in fatal conflict with the Seventh Amendment. Three members of the Court have put their name to an opinion which violates all rules of appellate review enshrined in the decisions of this Court and the Supreme Court of the United States, by attempting to resift, reweigh, reexamine and redetermine factual issues on plaintiff's Missouri common law fraud claim, despite two

lengthy trials in which 18 jurors, fairly chosen from cross sections of the [illegible] Missouri communities of Kansas City and Joplin, a[illegible]ave *personally heard, seen,* examined, sifted, weighed and determined the factual issues as the Constitution directs they—*and only they*—must do. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 at 359-60 (1962). Judicial integrity and conscience compel reinstatement of Craft's jury verdict.

Craft's common law fraud claim arose from a series of preemployment conversations between Craft and station management at KMBC, Ridge Shannon and Kent Replogle. In response to direct questions by Craft and a friend, Bob Hamilton, Shannon and Replogle repeatedly told Craft they did not intend to make her over or change her into something she was not, but that they were more interested in Craft's journalistic credentials, and "liked what they saw." Contrary to these representations management was already working with consultants on the changes that would be made in Craft's appearance. Management's efforts to remold Craft's appearance into their image began "from day one" of her employment, and continued unabated thereafter, until her removal for reasons related to her appearance. Material errors exist between this Court's recitation of evidence—set forth in the light *least favorable to Craft*—and what the trial record truly shows when "considered in the *light most favorable* to Craft." (emphasis added). *That fact alone* "would be a matter for rehearing" under local rule 16.

Rehearing en banc is warranted as well, however, because denial of any citizen's Seventh Amendment right to a jury trial is indeed a grave constitutional issue. The panel opinion destroys uniformity of this Court's decisions on the important subject of the rigid boundary of appellate

review of sufficiency of evidence for a jury, a boundary which all appellate courts are required to steadfastly and zealously secure against breach in order to preserve public confidence in our constitutional jury system.

As stated by the Supreme Court in *Atlantic & Gulf Stevedores, Inc., supra,* 369 U.S. at 359-60:

> We might agree with the Court of Appeals *had the question of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them.* . . . (Emphasis supplied)

The Supreme Court has often prohibited incursions by Courts of Appeal into the jury's sole province to weigh facts when alleged insufficiency of evidence results in reversal on appeal: *See, e.g., Mercer v. Theriot,* 377 U.S. 152 at 155-56 (1964); *Gallick v. Baltimore & Ohio Railroad Company,* 372 U.S. 108, 112-115 (1963) *and* cases cited; *Dick v. New York Life Insurance Co.,* 359 U.S. 437 (1959) [reversing this Court]; *Lavender v. Kurn,* 327 U.S. 645, 652-653 (1946).

The opinion is self-contradictory, in that the portion devoted to rejecting Ms. Craft's appeal of the trial judge's sex discrimination findings repeatedly admonishes Craft that the district court decision cannot be disturbed, because Craft's arguments "[b]oldly seek re-evaluation of the evidence and rejection of the district court's factual findings." (Slip Op. at 10).[1] All other trial court rulings challenged by Craft are met with similarly solid deference to the trial judge. Thus, the unanswerable questions are

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1. More than 25 times between pages 8-22 the opinion refers to the district court's discretion to decide sex-discrimination "facts," and the appeals court indeed "makes clear" its limited review *of those issues.*

how and why the panel opinion can embrace a completely new fact finding exercise on Craft's fraud claims—thereby suddenly abandoning all deference to the *jury* as fact-finder and the decision of this same district judge who considered and rejected defendant's arguments against submissibility of fraud *at least six times* in pretrial, trial and post-trial motions over the course of two trials before two different juries. The integrity of this Court's opinions demands reinstatement of Craft's jury verdict, for it defies law and logic to hold, as did the panel, that every aspect of Judge Stevens' memorandum order is impervious to attack—*except* his profoundly correct ruling that "it is apparent that the motion for judgment notwithstanding the verdict should be denied." 572 F. Supp. at 880.[2]

I. SUBSTANTIAL ERRORS EXIST BETWEEN EVIDENCE FAVORABLE TO CRAFT AND THE COURT OF APPEALS "FACT FINDING"

Court of Appeals Fact Finding:

"While it can be argued that Craft was 'made over' in being forced to exchange her *casual California* beach look—*she testified that in Santa Barbara she occasionally went directly from the beach to the studio. . . .*" (Slip Opinion at 27.) (*Apparent Source*: Ridge Shannon Vol. VI, 83.)

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2. Because Judge Stevens' rulings throughout both trials betray that his sympathies were not with plainiff, his rulings in favor of the sufficiency of evidence for submissibility are most compelling. Indeed although plaintiff vigorously opposed the order for separate retrial of the fraud claims, the panel opinion reduces the entire Joplin proceedings to an empty, monumentally wasteful mockery.

Actual Evidence Which Must Be Credited On Appeal

None. *Craft never testified as the opinion states;* Ridge Shannon did—but his testimony *must be* (but obviously was not) *ignored. Baynes v. Jenkins,* 593 S.W.2d 519, 521 (Mo. banc 1980); *Dace v. ACF Industries, Inc.,* 722 F.2d 374, 376-77 (8th Cir. 1983), supplemented, 728 F.2d 978 (8th Cir. 1984). The language of the appellate opinion also bears striking resemblance to the District Court's view of Craft's supposed "affinity for the casual beach life." 572 F. Supp. at 879.

To the contrary, clothing requirements of Kansas City were no different than the "normal clothing" worn in Santa Barbara and elsewhere where Craft had worked during her years in TV. (Vol. II, 189). Craft described "normal" appearance, which the jury could infer was "reasonable" for Kansas City, as follows (Vol. II, 193):

> Q. My question is, what do you mean when you say "normal clothing" and "that is a subjective term?"
>
> A. I mean the same things I had worn all my years in television in the sense of clean. I usually wear silk shirts and pearls or a blazer and a shirt, normal in that sense, a dress. I have always worn makeup. Always worn what I consider normal clothes.

"From day one" management's "relentless" obsession was on Craft's assymetrical face, makeup, the fact that one eye was smaller than the other, clothing selection and consultation. It can be more than "argued" Craft was "made over" as to everything all evidence showed, and *the jury believed,* she was forced to undergo. (Vol I, part 2 at 115-118, 128-31, 136-39, 142-47, 151-61, 170-76, 182-199; Vol. II, 7-19, 24-27, 31-38, 40-41; P. Ex. 104, 65)

This Court's unauthorized acceptance of Shannon's testimony robbed Craft of a jury evaluation on key credibility determinations. For example, Shannon testified regarding a preemployment conversation with Craft:

> I said, 'Do you understand we have consultants and the consultants, they offer coaching?' She said, 'I would be acceptable to that. That doesn't bother me.' I said, '*We get into appearance and clothes*' and she said, 'I am not much on makeup. I really don't care that much about clothing. This is one of my low priorities.' She said, '*In fact, sometimes I will get up in the mornings and if it is a nice morning I will go out and surf and I will go to work and just wear to work what I have got on. And sometimes I wear makeup and sometimes I don't*' and she said she did not care and did not have a lot of knowledge about clothing and makeup.
>
> I said, 'We would like to work with you on that and that would be what the coach with Media Associates could do.' She said, '*Boy, that would be great, I would like that. I would really appreciate that.*' (Vol. VI at 83)

Even on cross-examination, Craft's testimony remained staunchly different—and binding on this Court:

> Now is it also true during this time that you were talking to Mr. Shannon and Mr. Replogle there at that time of your audition and interview, you indicated that you had very little interest in the matter of clothing and makeup. *Answer*: I indicated that my primary interest was news. Question: Did you not also indicate that you would need help in those areas? Answer: *No, I did not indicate that I would*

need help in those areas. Question: *Was there not some discussion of your getting help in those areas?*

Answer: *There was not.* (Vol. II at 143-144)

In light of Craft's *uncontradicted* stated concerns about her appearance, Shannon's testimony that she enthusiastically embraced the prospect of station management and consultants "getting into appearance and clothes" appears incredible—as plaintiff argued *and was accepted by* the jury. Shannon's trial testimony also contradicted his own earlier sworn testimony:

Question: So, you didn't tell her if she was hired on she would be subject to the dictates of the Media Consultants?

Answer: Exactly the opposite.

(Vol. V at 130).[3]

Court of Appeals "Fact Finding"

"[*W*]*e believe* Craft in her audition interviews was concerned essentially with *hair and makeup and not with clothing.*" (Slip Opinion at 27.) (*Apparent Source*: Brief of Appellant at 30-36.)

* * *

"KMBC's statements to Craft were made in response to *her expressions of concern about her experience at CBS* where the network required her hair to be cut and dyed blonde, her eyebrow shade dyed black and heavy makeup applied." (Slip Opinion at 27-28.) (*Apparent Source*: Appellant's Brief at 32)

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3. These and other discrepancies in Shannon's testimony alone would have been a sufficient reason for the jury to disbelieve him entirely. *Dace v. ACF Industries, Inc., supra,* 722 F.2d at 378 n.8.

Actual Evidence Which Must Be Credited On Appeal

Contrary to what *this panel believes,* the record showed, and the *jury believed* Craft was concerned about changes in her *appearance generally,* not limited to hair, makeup or the CBS situation, because she wanted "to do what I felt was the best thing I did in communicating which was to be pretty much myself as often as possible." (Vol. I, part 2, 104). During plaintiff's conversations with Ridge Shannon, the subject of *appearance generally* was discussed:

> I reiterated to him again that if they wanted someone who looked different than the person on the tape, that I wouldn't be interested. (Vol. I at 90-91) I told him the CBS experience had made me extremely uncomfortable about *changes in my appearance* and if they liked what they saw we could talk further and I would come back for an audition. Otherwise I wasn't interested. (Vol. I at 91) If they wanted to hire someone who was bandbox perfect do not hire me. (Vol. I at 92)

In discussing the reasons why she accepted the employment offer in Kansas City, Craft testified:

> The original salary offer was not that much more than what I was making in Santa Barbara where I was still working at that time. The most important thing is that *I would be allowed to be myself* in every conversation between Santa Barbara and Kansas City, between Metromedia and Christine Craft. That was reiterated and I was assured that they had *no intentions of changing my appearance, they liked my appearance.* (Vol. II at 192) (Also see Vol. I, 104)

> When asked what kind of changes she had in mind during these discussions with Shannon, Craft testified, "change my appearance." (Vol. II at 187)

While the parties significantly differ on what was said during their preemployment discussions, even Ridge Shannon's testimony utterly destroys this Court's "finding" since *"appearance"*, was part of his discussions with Craft and the consultants. (Vol. VI at 83, 110).

Representatives of KMBC repeatedly assured Craft "They liked everything about me. *They didn't want to change me* . . . and they kept saying what they wanted was a journalist:"

> We love her just the way she is. What we are looking for is the fresh California beach look. . . . [W]e have a male co-anchor, and we want to balance him with a strong, independent woman. And what we like is Christine's freshness and her naturalness. . . . We love the way she looks. (Vol. III at pp. 11-12) When Craft told Shannon that makeup and hair were not one of her first priorities, "They said they liked what they saw." (Vol. I at 173) Management repeatedly said, What they wanted was a good journalist. (Vol. I, Part 2, at 173)

Craft further testified on cross-examination that *clothing* as well as makeup was a part of her discussion with Shannon and Replogle. (Vol. II at 134-135) Credited evidence on general appearance could not be clearer or more opposite to the opinion:

> Q: [W]hat changes did you have in mind when you had these discussions with Mr. Shannon?
>
> A: Change my appearance (Vol. II, 87) * * * everal times I told them and they concurred, *what you*

> *see is what you get.* If you want to *change me, change my appearance, don't hire me.* (Vol. II, 88)

Even Replogle used the term *appearance,* agreeing management told Craft they did not intend to make her over, redo her or change her fundamental appearance. (Vol. III at 210); he admitted Craft had said she was not interested in a job which involv[ed] "*making me into something I am not.*" (Vol. III at 166, 228) Other witnesses discussing the requirements imposed by KMBC referred continually to KMBC general appearance requirements which, as the *jury was free to infer,* from common sense and the context of all evidence, *included* not only makeup and hairstyles but clothing as well. The jury simply was *never* confronted with—or else weighed and rejected—the type of fine distinction this Court seeks to impose. (See for example, Vol. IV at 74, 91, 214, 228; Vol. VI at 166, 215.)

The CBS experience and its effect on Craft as explained and discussed with management of KMBC was considerably broader than mere hair color and eyebrow makeup, and was related to Craft's general concerns about appearance. Bob Hamilton repeatedly reminded management:

> You know what CBS did to Christine. They tried to make her into something she was not. They tried to change her and she doesn't want to come to work for you if that is what you are going to try to do her now.

(Vol. III at 45) In fact in Bob Hamilton's conversation with Ridge Shannon, the lopping off of Craft's hair and making her into a blonde at CBS was *not mentioned.* The term makeover and change her into something that she is not were the terms that Hamilton used in his conver-

sation with Ridge Shannon. (Vol. III at 45) Kent Replogle admitted telling Craft "You don't want a makeover and I agree with that." (Vol. III at 208-209) Further, Shannon and Replogle were told Craft "wants to be a journalist, not a beauty queen." (Vol. III at 45-46)

Crucially, management never told Craft of its always-extant belief that *appearance* was the number one criterion for a television newsperson (Vol. III at 174-175), and that Shannon always believed *"having an attractive anchor was part of the requirement for effective delivery of the news on Channel 9."* (Vol. V at 119, 120)

Court of Appeals Fact Finding

> "There is, however, no evidence that the station at the time it made the challenged representation knew it would exercise such an intrusive degree of control or knew that such control would be in its eyes necessary." (Slip Opinion at 28) (Apparent Source: Appellant's Brief at 36-37)
>
> "There is no evidence that the station had any knowledge where along this spectrum Craft might fall or what facilities she might demonstrate in adjusting her wardrobe to the Kansas City climate and market." (Slip Opinion at 28) (*Apparent Source*: Shannon, Vol. VI at 107)

Actual Evidence Which Must Be Credited On Appeal

Present intent to change Craft could not have been more strongly shown—by direct and circumstantial evidence.[4] The Media Associate consultants reviewing the

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4. As Instruction No. 14 aptly provides, "[i]ntent can be inferred from circumstantial evidence because a defendant's intent not to perform will seldom be capable of proof by direct evidence." Missouri law is in full accord. *Allison v. Mildred*, 307 S.W.2d 447, 453 (Mo. 1957); *see Martin v. Brune*, 631 S.W.2d 77, 80 (Mo. App. 1982); yet Craft *proved intent* by *direct evidence*.

audition tapes for the purposes of reporting to KMBC's management had negative comments concerning Craft's dress and hair and concluded her "overall look" and "appearance" would not work, because her "look" was not sophisticated enough or as conservative as Kansas City required. (Vol. IV at 212-214) Lynn Wilford and Ridge Shannon had several conversations *before Craft began work* concerning Craft's "problems on camera" and the "work" that Lynn Wilford was to do with Craft concerning these problems. Ridge Shannon *agreed* with most of Wilford's assessments of Craft's "problems." When Shannon sent Craft to Dallas to first meet Lynn Wilford in December of 1980 before Craft reported to work, he "[s]pecifically told Lynn, I do not want you to talk to Christine about appearance. . . ." (Vol. VI, 111) He told Wilford that Craft had been hurt badly by the CBS situation, and that he did not want Wilford to work on her appearance but that *"he wanted to work on that himself in Kansas City."* (Vol. IV at 218) Thus, the allowable inference *for the jury* was Shannon knew *at that moment* that management and the consultants intended forcing changes in Craft's appearance once she reported for work. Because he knew from Craft's statements regarding CBS that what the consultants and he contemplated would be *precisely what Craft did not want,* Shannon wanted to hide his deceit.

Given Shannon's undisputed admission that changes in Craft's appearance were intended, the intrusive degree of control which the jury found Shannon *would and did exercise* over Craft's appearance was amply supported by the station's past practice and history of working with individuals' appearance. (Vol. IV at 72, II at 220) The Court's own opinion recognizes that where management thought on air performers had appearance problems, management exercised control that a jury could find "in-

trusive." (Slip Op. at 13-14, 26) Such evidence, together with management's belief that appearance was the "number one criterion" for a newsperson, inexorably led *the jury* to the inference that similarly "intrusive" measures were in store for Craft; but no *inference* is necessary because intent was established *by direct evidence.*

The evidence and reasonable inferences to be drawn therefrom demonstrated that station management recognized problems with Craft's appearance before hiring her, that station management intended to work on these problems and that in the past it had exercised *what the jury could infer was "intrusive"* control over on air personnel when appearance issues arose. There was more than sufficient evidence on defendant's intent. In fact, under the rule in *Pinken v. Frank*, 704 F.2d 1019 at 1026 (8th Cir. 1983), what the *panel admits* is enough to establish "intent".[5]

Court of Appeals Fact Finding

> "Even if Craft does have an arguable position that the representation that no 'makeover or substantial changes' had application to clothing, *a reasonable jury could not have found a make over until KMBC's efforts reached their most extreme extent in the late days of Craft's employment.*" (Slip Opinion at 28)
>
> "In fact the *record is basically uncontradicted as to the gradual increase in the intensity* of measures taken by KMBC in regard to Craft's appearance." (Slip Opinion at 28)

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5. In *Pinken v. Frank* this Court held:

Although the existence of fraudulent intent is never presumed, it *may be inferred* where a party knowingly misstates a material fact, knowing that the party to whom it is made will rely on it. (Emphasis added).

No doubt plaintiff had that and more.

"Craft at first was given only the *most general advice* through books, fashion magazines and a memorandum *suggesting* makeup techniques." (Slip Opinion at 28)

"Even taking the evidence as establishing that KMBC's actions differed from those promised, the *record does no more than suggest that the station,* because of difficulties it experienced with Craft *changed its mind,* as to steps that would be necessary as to her appearance."

Actual Evidence Which Must Be Credited on Appeal

The credited evidence flatly contradicts an asserted "gradual increase in intensity" of appearance measures. Craft testified appearance criticisms began "immediately" and were "continuous" and "relentless" "from day one" until she was removed. (Vol. I, Pt. 2, 130-137, 171-72, 193) No more is required; but there is *much more.* Significantly, Shannon admitted that he began criticizing Craft's appearance "from day one" of her employment (Vol. VI at 215) and that he began working on her clothing and appearance from day one. (Vol. VI at 230)

Wilford was requested by Shannon to make an "emergency visit to Kansas City on January 14," within nine days of Craft's debut, "to work with Pam [Whiting] and Christine on their appearance." (Vol. IV at 220-221) On "day one" Shannon told Craft one eye was too small, her jaw was too square and her clothes did not look right. (Vol. I, Pt. 2, at 128-130) Immediately thereafter, Lynn Wilford performed the *specific, intrusive* "ill-fated" makeup application she was forced to wear on air (Vol. I, Pt. 2, 142-146), and gave Craft a *detailed, specific* "makeup analysis" by Gigi Coker, a woman Craft never met. (Vol.

I, Pt. 2, 151-52)[6] In January Ridge Shannon did not "suggest" but told Craft "to follow these instructions." (Vol. II, p. 8-9; P's Ex. 65). If Craft had known of such requirements, "I never would have gone to work for KMBC Metromedia." (Vol. II, 12) In *January* of 1981, Lynn Wilford took her to Macy's for the purpose of obtaining clothes. (Vol. II at p. 15) In February of 1981, she was sent to Macy's for clothes and began trying these clothes on in front of the camera. (Vol. II at 15-16)) Not only did "intrusive" working-hour sessions begin in February with Maureen Shawver at Macy's but it continued thereafter. By March of 1981 when Ridge Shannon *directed her* to go to Macy's to obtain particular clothes, i.e., a bowed polyester blouse in place of the cream silk blouse with pearls she was wearing, she had already been taken to Macy's on previous occasions by Lynn Wilford. (Vol. I, Pt. 2, at 174).

When station management started "from day one" working on Craft's appearance, no research had been done concerning her appearance, and, as shown above, credited evidence bindingly establishes appearance was the focus "continuously," from beginning to end. (Vol. II, 16-17) No more is required for the jury. Although defendant argued at the second trial it merely had "changed its mind" about appearance activities due to negative focus group research in June, Judge Stevens recognized, "change in mind is a fact issue" (Vol. II, 30) which defendant

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6. P's Ex. 104 (which includes Ex. 65), attached hereto for convenience, starkly exposes the utter falseness of the opinion's characterization of these intrusive mandates as "the most general advice" or "suggestions." The jury was free to determine the opposite. (See also P's Ex. 138, 151, 152, 155, 163, 315, 358)

urged but the jury flatly rejected.[7] Prior to the implementation of the fashion calendar in July of 1981, Craft testified that in June of 1981 when she and Ridge discussed her appearance as a result of the focus group tapes, she at that time had been wearing clothes selected for her either by Lynn Wilford or Maureen Shawver for several months, going back to January and February of 1981. (Vol. II at 24) "Intrusive" is a normative term—for the jury, not this Court.

Court of Appeals Fact Finding

"It is well to consider further what 'makeover' or 'substantial changes' means." (Slip Op. at 26)

"The record reveals *no action by KMBC in regard to Craft's hair or makeup that could be seen as constituting a 'make over'*. . . . Furthermore, Craft was

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7. Although not precisely relevant to the issues in this appeal, the district court and possibly the panel in light of its result was puzzled as to the defendant's motive. Why would the defendant bring Craft half-way across the country to defraud her? The answer is simple.

Shannon admitted on cross-examination that they had screened approximately 200 people about the co-anchor job prior to Craft (Volume VI at 165-166) and at the time they were talking with Craft they were running up against their deadline set for the selection of a co-anchor. (Volume VI at 166-167) (1) She fit budget; (2) was not under contract; and (3) was a good journalist. (Vol. VI, 73-74) She was the last of the three finalists to audition. (Vol. VI, 76) Wilford admitted that the group opinion was that Craft was the strongest of the last three candidates being screened when Craft was selected. (Volume IV at 215) But, as Shannon damningly testified, she was "overly reluctant to leave California to come to Kansas City," so Shannon "tried to be as persuasive as possible." (Vol. VI, 187) As argued to the jury, the station could not afford to hire the people they wanted for co-anchor. Of the remaining individuals Craft had the best potential to be remade over into something the defendant wanted but could not afford. When Craft failed to meet the station's "dress, makeup and general appearance" expectations, and "resisted attempts to improve her . . . .", she was removed as anchor. (Vol. III at 215)

allowed to apply her own makeup except for the one ill-fated occasion, and *we do not believe mere suggestions constitute a 'make over.'*" (Slip Opinion at 27, footnote 17)

Actual Evidence Which Must Be Credited On Appeal

As earlier discussion cements, reasonable minds might differ on what "make over" means or what constituted a make over. Such was for the jury to decide—*not this Court.*[8] Appearance changes were not "mere suggestions" but *requirements for Craft's job.* (Vol. II, 126; Vol. IV, 236; Vol. V, 110-120).[9]

II. THE OPINION IS CONTRARY TO ESTABLISHED LAW REGARDING THE SUFFICIENCY OF EVIDENCE FOR FRAUD AND THE REQUIRED REVIEW OF JURY ISSUES

The panel's opinion is fundamentally flawed not only by its failure to acknowledge plaintiff's evidence and the reasonable inferences the jury could and did draw therefrom, but also by its misuse of authority concerning required scope of review. Part I establishes the opinion merely recites but does not follow the applicable rule that it can only find in favor of Metromedia if "all the evi-

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8. The opinion footnotes, "*Shannon and Replogle were convinced . . .* actions they took . . . did not constitute a makeover." *Id.* n.16. This is only the most obvious proof that appellate review was improper. *Dace,* supra; *Bayne v. Jenkins,* supra. Indeed, if management's opinions were the legal standard, there would be no need for courts and juries.

9. Craft begs the indulgence of the Court concerning the additional length of this petition. However, because of the depth of the panel's misreading of the record, anything but a point-by-point response would be inadequate. Because at least six members of the Court are unfamiliar with the lengthy record in this case, a detailed statement is needed to properly present the issues to the full Court.

dence points one way and is susceptible of no reasonable inferences sustaining the position" of Craft. (*See* Slip Op. at 23 citing *Crues v. KFC Corp.*, 729 F.2d 1145, 1148 (8th Cir. 1984)). The panel opinion is further defective because it ignores the amplification of this standard contained in the very case cited by the panel opinion. *Crues* held this court "*must . . . assume as true* all facts supporting [Craft] which the evidence *tended* to prove. . . ." *Id.* at 1148. *See also Easley v. Empire Incorporated,* 757 F.2d 923, 928 (8th Cir. 1985), and cases cited therein, wherein Judge Gibson declares:

> We can interfere with the conclusion of a jury only where there is a 'complete absence of probative facts' to support the verdict.

This rule is necessarily inconsistent with the opinion's conclusion that "the intent to work on Craft's appearance [was] demonstrated abundantly by her evidence" but that this somehow was not sufficient to make a submissible case on whether the defendant had an intention to impose a make over or substantial change.[10]

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10. An example of the Court's fundamentally misguided opinion is its reliance on *Dillard v. Earnhart,* 457 S.W.2d 666 (Mo. 1970). (*See* Slip Op. at 29.) The differences between the *Dillard* and the *Craft* cases are stark. The *Dillard* court involved a review of a *trial finding of no fraud,* rather than a 12-member jury decision that the defendant *had* acted fraudulently. Thus, the fraud argument was entitled to *no favorable inferences.* The *Dillard* opinion observes that "all the evidence" supports the result. Even this panel does not make so bold a statement about the case at bar. The *Dillard* case concerned a clear, significant change of circumstances that led to Clyde, Sr.'s refusal to release the deed. Here, without any change of circumstances whatsoever, the defendant began to implement the makeover and, at the same time, took concrete steps to conceal this intention from Craft. The panel's attempt to legitimize its violation of the jury-judge separation by a citation to *Dillard* is nonsense. The *Dillard* case provides *no* support for the court's ill-advised avoidance of the Seventh Amendment limitation.

In light of the scope of review this Court must follow, it is inconceivable that any "reasonable panel" could conclude that it was not for the jury to determine whether *the intent to work on Craft's appearance,* which the panel opinion repeatedly admits is "demonstrated abundantly" by the evidence, does not create a jury question on whether the defendant's state of mind was to cause a "makeover" or "substantial changes" in Craft's appearance. Whatever the panel or Shannon and Replogle may "believe" as to what amounts to a makeover or substantial change is totally irrelevant and should not be in this Court's opinion. Craft obviously believed makeover and substantial changes occurred, and that is what counts, since, as always, the question is what *the jury believed* and could reasonably find based on the evidence.[11]

If the evidence supported the conclusion that the defendant intended to work on Craft's appearance, the evidence necessarily "tended to prove" defendant intended to do a makeover or substantial changes, depending on which party's argument the jury believed—here obviously Craft's. Intent is locked in by *Pinken v. Frank,* 704 F.2d at 1026. The Court cites *Toenjes v. L. J. McNeary Construction Co.,* 406 S.W.2d 101, 105 (Mo. App. 1966), but stubbornly, inexplicably, does the opposite of applying its rule:

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11. The opinion wrongly implies that "makeover" is a term of art. It is not. It is a common term, for which no "definition" was requested or necessary; here it was amply defined for the jury by the context of all conduct—from many different conversations and transactions—which was properly combined and submitted to the jury as the "ultimate factual" issue making up the misrepresentation. *Webster's Third International Dictionary* pertinently defines it as "2b: REMAKE, REMODEL, RENOVATE . . . ."

> The truth or falsity of representations is to be judged *in the light of the meaning which plaintiff would reasonably attach* to them in the existing circumstances . . . and the words must be considered against the background and in the context in which they were used. *Emily v. Bayne*, Mo. App. 371 S.W.2d 663. (Emphasis added).

Thus, the panel not only usurps the role of the jury to determine the ultimate issue of the defendant's state of mind, it also draws a definitional distinction which is exclusively a matter of degree and judgment based on common sense and community standards—exactly the kind of issue juries are designed to resolve.

Faced with substantial evidence to support the jury verdict, the court contorts the facts and the law to reach its predetermined goal. The panel opinion is an excellent example of an analysis dictated by its already chosen result.[12] The panel ignores established law which accords Judge Stevens decisions on submissibility under Missouri law "great weight." *See e.g., Jasperson v. Purolator Courier Corporation,* 84-1810 and 84-1844 (8th Cir. June 24, 1985) at 6 and cases cited therein; *Melia v. Ford Motor Co.*, 534 F.2d 795, 799 (8th Cir. 1976). The opinion flies in the face of philosophies embodied in written opinion, articles and other pronouncements by the members of this Court. *See, e.g.,* Linder, *How Judges Judge: A*

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12. Implicit in the court's analysis is the premise that what the defendant did was a business judgment which should not be second guessed by a court or a jury. Although politically palatable to some members of the judiciary, this court should not so cavalierly follow its own personal preferences and ignore the role of law. That law was applied by two unanimous juries which found sufficient evidence to award punitive as well as compensatory damages. These juries heard *all* the evidence and were not handicapped by the dry, lifeless record on appeal.

Study of Disagreement On The Court of Appeals for the Eighth Circuit, 38 Ark. L. Rev. 479 (1985); Bright, *The Ten Commandments of Oral Agreement,* 67 ABA Journal Sept. 1981, noting, "appeals courts as a rule do not try cases de novo. Federal appeals courts almost never do;" Judge Arnold's dissent in *Lehman Bros. Kuhn v. Clark Oil & Refining Corporation,* 739 F.2d 1313 at 1319 (8th Cir. 1984), "[c]ases should turn on the law, the facts, and the conscience of the judge, and on nothing else."

Craft requests rehearing on all issues, inasmuch as Craft's clear entitlement to a jury determination on fraud causes irreconcilable conflict between sex discrimination findings and jury findings on fraud. Indeed, where the opinion improperly tries to create conflict between the fraud evidence and the first trial verdict director, rehearing is necessary because the verdict director in the first trial did not have the term "substantial" which now troubles the court. (J.A. 161)[13] Thus, the Court must more carefully consider Craft's serious arguments for reinstatement of the first verdict, as well as all other issues perfunctorily handled in Part III of the panel opinion. Rehearing also is suggested from a new opinion by the Missouri Supreme Court, which fortifies Craft's challenges

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13. Craft is entitled to reinstatement of her jury verdict, but due only to the vulnerable position the panel has put her in, we must mention that rehearing is required also because the opinion takes away *everything* when, in fact, instruction deficiencies or supposed infirmity in proof of actual intent—*all of which Craft denies*—would call for new trial since even by the erroneous rendition of evidence allowed in the panel's opinion, Craft would have the right to submit on representations made "without knowledge of their truth or falsity." See, e.g., *Wilson v. Murch,* 354 S.W.2d 332 at 339 (Mo. App. 1962); M.A.I. 23.05. A holding there was "insufficient evidence"—again, which Craft denies—also raises a new trial issue which Craft as prevailing party below was not in a position to raise, i.e., erroneous exclusion of evidence at trial.

to the order of retrial and rejects several arguments raised by Metromedia's appeal. *Firestone v. Crown Center Redevelopment Corporation*, No. 66840 (Mo. en banc June 25, 1985).

CONCLUSION

The second unanimous fraud verdict must be affirmed, for it is demanded by "the law, the facts and . . . conscience." Affirmance will not open the flood gates of litigation in employment cases, for fraud always must be established solely by the facts of each case—facts which here have simply met *all* tests, at all procedural stages af the litigation, and most importantly, have convinced our constitutionally anointed finders of truth—the jury—after two hotly contested trials. Truly, a more real danger created by the panel opinion is that the cold plunge into *de novo* reexamination of jury issues will likely *increase appeals*—to an already overburdened Court—from disgruntled jury verdict losers who now see a breach in the constitutional fortress which our Founders erected to protect jury trials from improper appellate second guessing.

Perhaps no one has stated the principle underlying jury verdict review more eloquently than Judge Arnold, in *Dace v. ACF*, supra, 722 F.2d at 376-77:

> Occasionally verdicts may be returned with which judges strongly disagree. This is a price, we think, worth paying for the jury system, which is embodied in our Bill of Rights and sanctified by centuries of history. When questions of fact are involved, common sense is usually more important than technical knowledge, and twelve heads are better than one.

Or *three*. Rehearing or rehearing en banc is requested on all issues. Counsel's Rule 16 Statement is attached.

Respectfully submitted,

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Attorneys for Appellee/Cross-Appellant Christine A. Craft

I hereby certify that a copy of the above and foregoing was mailed, postage prepaid, this 22nd day of July, 1985, to:

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Spencer, Fane, Britt & Browne
1000 Power and Light Building
106 West 14th Street
Kansas City, Missouri
Attorneys for Appellant/
Cross-Appellee Metromedia, Inc.

/s/ Dennis E. Egan

RULE 16 REQUIRED STATEMENT FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that the decision is contrary to the following decisions of the United States Court of Appeals for the Eighth Circuit and the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court:

A. *Supreme Court Opinions*: *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962); *Mercer v. Theriot*, 377 U.S. 152 (1964); *Gallick v. Baltimore & Ohio Railroad Company*, 372 U.S. 108 (1963); *Sentilles v. Inter-Caribbean Shipping Corporation*, 361 U.S. 107 (1959); *Dick v. New York Life Insurance Company*, 359 U.S. 437 (1959), reversing this court because "it committed its basic error in resolving a factual dispute in favor of respondent;" *Lavender v. Kurn*, 372 U.S. 645 (1946); *Tennant v. Peoria & Pekin Union Railway Company*, 321 U.S. 29 (1944).

B. *Eighth Circuit Cases*: *Easley v. Empire Incorporated*, 757 F.2d 923, 928 (8th Cir. 1985); *Crues v. K.F.C. Corporation* 729 F.2d 1145 (8th Cir. 1984); *Dace v. ACF Industries, Inc.*, 722 F.2d 374 (8th Cir. 1983), supplemented, 728 F.2d 978 (8th Cir. 1984); *Pinken v. Frank*, 704 F.2d 1019 (8th Cir. 1983).

I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of exceptional importance:

1. Does the panel opinion violate the Seventh Amendment by giving mere lip service to the appropriate stan-

dard of appellate review, while failing to accord Christine Craft, the party who obtained two unanimous jury verdicts, the most beneficial view of the evidence possible in conformity with Missouri substantive law on sufficiency of evidence to make a case of submissible fraud and Eighth Circuit decisions regarding sufficiency of evidence to make a submissible case of fraud and to create a submissible jury issue in general.

2. Does the panel opinion violate the Seventh Amendment, the Rules of Appellate Review and Missouri substantive law by undisputedly setting forth and relying on defendant's evidence where it is at odds with other direct evidence and inferences that can be drawn to the contrary in plaintiff's favor.

3. Does the opinion fail to accord the proper deference to the decision of the District Judge who, based on Missouri law, overruled defendant's claims of insufficient evidence for a submissible fraud case at every juncture during the course of two trials—the latter of which was specifically ordered by the District Judge on the separate issue of fraud.

Respectfully submitted,

/s/ Dennis E. Egan
Dennis E. Egan
Attorney for Appellee/Cross-Appellant Christine A. Craft

THE MEDIA ASSOCIATES
Audience Development

CONFIDENTIAL*

January 28, 1981

Mr. Ridge Shannon
News Director
KMBC-TV
11th and Central
Kansas City, Missouri 64105

Dear Ridge:

In this letter I would like to summarize what occurred during my last visit, share my observations from Christine's coaching session and discuss the schedule we outlined for my next visit. For your information, I have included the makeup outline I gave Christine during our session as well as a critique of Christine's makeup problems by our makeup specialist, Gigi Coker.

THE COACHING SESSION

I found that, off camera, Christine is an intelligent, attractive and personable individual. Her performance strengths are a result of these natural abilities and Christine's energy level which help her reach out to the audience.

The areas of Christine's performance weaknesses are her authority, credibility and technical delivery. During the session, Christine recognized that on-camera she has a tendency to project an image rather than being herself. She has associated acting out a masculine role with having authority and credibility rather than letting these characteristics grow from self-confidence. This improper

*Plaintiff's Exhibit 104 (See fn. 6, A89)

mental image has also affected her vocal delivery, causing her to talk in a pattern rather than in a conversational tone. She also has a tendency to talk much louder than she needs to, and she noticed that when she talks softer, she is able to use more of her vocal range and expression.

After the session, Christine and I established the following goals:

1. Christine needs to concentrate on communicating honestly with the viewer rather than projecting an image.
2. Along with being herself, she needs to be involved with her copy and develop stronger interpretation. By using a variety of moods, especially those of confidence and authority, Christine will strengthen her style and credibility.
3. Rehearsal is an integral link to Christine's success for the preceding goals. During the session, Christine noted how rehearsal helped change her from a reader into a solid communicator; however, she will probably need to be reminded to do this.
4. Finally, Christine needs to develop her voice by limiting her volume and talking in a natural conversational style rather than in a set rhythm pattern.

SUMMARY OF JANUARY 14 VISIT

During my last visit, I spent the majority of my time with Christine Craft giving her ideas and ways for her to develop and improve her personal appearance. We worked mainly on her wardrobe and followed this with a brief makeup session. I discussed with Christine how she needs to develop a look of professional elegance in addition to reasons why she has problems with developing her wardrobe. The first and most obvious cause is that

Christine has come from a relaxed, casual television market which accepted almost any type of clothing. The second reason is that Christine has a basic problem with not knowing which colors, styles and types of clothing are the most flattering for her work. I feel that she will need to be monitored closely until she develops a sense of style and is able to coordinate her outfits. The books I sent you should provide a foundation, and with additional consultation we should see improvement.

I also spent time with Pam Whiting. I gave her a performance critique and also talked about her wardrobe and hairstyle. I am glad to see her working on her appearance, losing weight and incorporating the makeup techniques that Gigi Coker gave her. Pam has also read several of the wardrobe books I suggested. These will be a help to her planning of her anchor wardrobe.

SCHEDULE FOR NEXT VISIT

The objective of my next visit is to work on tandem presentations for both the main and weekend shows. During my visit, I anticipate working not only with the talent but also with the producers. Here is a rough schedule that we discussed:

February 5

9-11 a.m.	Planning meeting with Ridge
11-2 p.m.	Meeting with producers and anchor talent from the weekday and weekend staffs
2:30-4:30 p.m.	Coaching session with Christine and Scott
4:30 p.m.	Open for work with individuals as needed

February 6

9-11 a.m.	Coaching session with Pam and Corrice
11:30-12:30 p.m.	Meeting with producers on communicating with talent
12:30-2:30 p.m.	Lunch with Ridge and Kent
2:30-4:30 p.m.	Tentative session with Christine and Scott
4:30 p.m.	Summary meeting with Ridge

Ridge, I am anticipating talking with you this week to confirm this schedule. As usual, feel free to call if there are any problems with these arrangements. Oh yes, and thank you for getting the tapes of the specialist reporters to me so quickly.

Best regards,

THE MEDIA ASSOCIATES
/s/ LCW
Lynn C. Wilford
Talent Consultant

LCW:pac

Enclosures

Copies: Kent Replogle
Tom Tilson

EVALUATION OF CHRISTINE CRAFT'S MAKEUP
BY GIGI COKER

1. *Makeup at former station.* Christine has a very nice smile and eyes. However, the attention to these areas is reduced due to several problems. The first and most obvious is that Christine is not blending her makeup.

The most severe problem occurs around the eye area where she is using too much hilight under the eye and on the brow bone above the eye. The lack of blending makes her eyes look racoonish, and the hilight above the eye makes her eyes look puffy. The second problem is lack of color on her lips and cheeks.

Complexion—The quality of the video makes it difficult to evaluate Christine's complexion and base that she is using. However, she seems to have a great deal of natural color in this picture. It is difficult to see what sort of contouring her face needs. However, her eyes and mouth need to be accented.

Eyes—It looks as though Christine is using blue eye shadow, which is not complimenting her skin or hair color.

Mouth—Christine has a nice smile, but her lipstick is much too light for the lipliner she is using.

Cheeks—Christine could use more blush, bringing it forward to the center of her face instead of keeping the color on the sides of her cheeks.

2. *Makeup at KMBC before the session.* Christine's basic problem is that she looks completely washed out. Her skin, hair, dress and the set colors are all blending together. Because her hair has been lightened, she is not only going to need more makeup, but she will need to use makeup with more color to help bring her features out. The light browns, pinks and peaches will not be effective. She is going to have to use more reds, burgundies and richer earth tones in her makeup. Her wardrobe can also help bring color to her face. She should purchase clothing which will compliment the lighter colors of her face and provide contrast with the

background of the set. The teal blues, navies, purples, reds and terra cottas should all keep her from "fading out" and work well for her, provided, of course, that her makeup is balanced with the intensity of her outfits.

Regarding Christine's face structure, she will have to pay special attention to her eyes, jaw, nose and brow areas. The first and most crucial area is her eyes. Her left eye will need to be highlighted and shadowed so that it does not look as small and slanted. The circles under her eyes should also be highlighted and blended carefully. Christine's jaw bones are square, with the left one larger than the right. This will need to be contoured. Christine's nose also needs to be contoured, especially the bridge between her eyes. Christine's eye brows look uneven and will need to be darkened slightly.

3. *Makeup from the Newsbrief.* Christine's makeup from the session is well blended and contoured. The face still needs more blush and color on the cheeks. The highlight and shadowing around the eyes is correct and almost totally eliminates Christine's problem with the circles and smaller left eye. The intensity or amount of makeup should be reduced slightly. The lines under the eye need to be smudged, and the powder under the brow extends up too far. The jaw, nose and brows all look fine.

4. *Makeup after the session.* The post-session makeup looks much better than the makeup prior to the session. The blending is much better and it seems that more time was spent working with the problem areas.

   Eyes—The shape and size of the left eye is more obvious in this newscast than in the newsbrief. Christine might

want to consider doing either one of two things to make the sizes seem more even. The first is to make the left eye look larger by placing more hilight on the left lid directly above the pupil. The second thing she could do is to make the right eye look smaller by placing a thin dark line of eyeliner on the inside of the bottom of the right eye. She should still use liner under the bottom lashes on both eyes to make the left one seem less crooked.

Contouring—More shape is needed on the bridge of Christine's nose and her left jaw.

Powder—Christine should be using powder to help set her makeup and reduce the shine. In this newscast we are getting hot spots on her nose and forehead.

Cheeks—Christine needs to use more color on her cheeks. The earlier suggestion for types of color still applies, but the most important thing to remember is to match makeup with the color in an outfit. For example, don't wear plum rouge with an orange blouse.

Hair—In several of the newscasts, the back of Christine's hair looked unusual. I would suggest that she brush it out a bit more and make the back of her head look more even.

*CONCLUSION**

Christine needs to accent her best features which are her eyes and mouth. She needs to work on problem areas around her eyes, brows, nose and mouth. Proper blending and powdering will help Christine maintain consistency in her makeup. Finally, Christine must work on choosing colors for her makeup and wardrobe which will draw focus to her face.

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*3-page illustrated make-up chart with directions for Christine Craft omitted due to inability to reproduce facsimile.

APPELLATE REVIEW OF CIVIL JURY VERDICTS

The table which follows is a summary of the reported federal appellate decisions contained in volumes 743 through 774 of Federal Reporter Second. These volumes span the most recent full year of officially reported appellate decisions, and cover the period from October 1984 through October 1985. The cases summarized are those in which the appellate court considered a claim that the factual finding of a civil jury should be overturned for lack of evidence. In most instances the appellate decisions discuss the sufficiency of the evidence in those very terms; in several cases the appellate opinion discusses the evidence as if the factual dispute were before it for a *de novo* resolution. Both types of decisions are included. The summary of the issue and disposition refers to the specific issue concerning which a jury's verdict was challenged on appeal. Cases involving cross appeals of the same verdict by opposing parties were treated for statistical purposes as two appeals but the case is listed only once.

Appellate decisions reversing part but not all of a challenged jury verdict are denoted "reversed in part." Where a distinct portion of the damages is reversed because of an asserted lack of evidence on a particular issue, that is referred to as a reversal in part; where the appellate court concluded that the jury did not err in awarding the type of damages at issue, but held that the amount of the award was excessive, the decision is described as reducing the jury's verdict. In some instances an appellate court, although reversing a verdict because of some legal error, also holds that the evidence would be sufficient to uphold a similar jury verdict were it returned after a second trial; these decisions are treated as *affirmances*.

Constitutional cases which involved claims of discrimination are listed as discrimination cases. Decisions awarding judgment n.o.v. and ordering a new trial because the first verdict was against the weight of the evidence are both characterized as a *reversal* if the action is sustained on appeal. Remittiturs and orders reducing a verdict are both categorized as a *reduction* in the verdict.

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Cases Reviewed

Conti v. Ford Motor Co., 743 F.2d 195 (3d Cir. 1984) (personal injury claim; verdict for plaintiff; reversed)

Hintz v. Jamison, 743 F.2d 535 (7th Cir. 1984) (personal injury claim; verdict for plaintiff; affirmed)

Fields v. Washington Metropolitan Area Transit Authority, 743 F.2d 890 (D.C. Cir. 1984) (personal injury claim; verdict for plaintiff; affirmed)

Handguns, Inc. v. Ethicon, Inc., 743 F.2d 1282 (9th Cir. 1984) (commercial claim; verdict for plaintiff; affirmed)

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*Because this project involved in-put from many persons and required judgment calls as to result and applicability due to lack of clarity in certain opinions, there may be room for difference of opinion on certain judgments. However, the overall statistical pattern would remain the same, regardless of how judgments have been made as to certain cases.

Wegerer v. First Commodity Corp. of Boston, 744 F.2d 719 (10th Cir. 1984) (commercial claim; verdict for plaintiff; affirmed after remittitur)

Abasiekong v. City of Shelby, 744 F.2d 1055 (4th Cir. 1984) (discrimination claim; verdict for plaintiff; affirmed)

Smith v. Updegraff, 744 F.2d 1354 (8th Cir. 1984) (discrimination claim; verdict for plaintiff; affirmed)

Haney v. Mizell Memorial Hospital, 744 F.2d 1467 (11th Cir. 1984) (personal injury claim; verdict for defendant; affirmed)

Lerman v. Flynt Distributing Co., Inc., 745 F.2d 123 (2d Cir. 1984) (miscellaneous claim; verdict for plaintiff; reversed)

Jurgeson v. Fairfax County, Va., 745 F.2d 868 (4th Cir. 1984) (constitutional claim; verdict for plaintiff; reversed)

Estate of Davis v. Johnson, 745 F.2d 1066 (7th Cir. 1984) (constitutional claim; verdict for plaintiff; reversed)

W. A. Wright, Inc. v. KDI Sylvan Pools, Inc., 746 F.2d 215 (3d Cir. 1984) (commercial claim; verdict for plaintiff; reversed in part)

Haley v. Pan American World Airways, 746 F.2d 311 (5th Cir. 1984) (personal injury claim; verdict for plaintiff; verdict reduced)

Smith v. Shell Oil Co., 746 F.2d 1087 (5th Cir. 1984) (personal injury claim; verdict for plaintiff; affirmed)

Katch v. Speidel, 746 F.2d 1136 (6th Cir. 1984) (miscellaneous claim; verdict for plaintiff; verdict reduced)

Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984) (constitutional claim; verdict for plaintiff; reversed in part)

Sit-Set, A.G. v. Universal Jet Exchange, Inc., 747 F.2d 921 (4th Cir. 1984) (commercial claim; verdict for plaintiff; reversed in part)

Kokesh v. American Steamship Co., 747 F.2d 1092 (6th Cir. 1984) (personal injury claim; verdict for plaintiff; affirmed)

Morrill v. Becton, Dickinson and Co., 747 F.2d 1217 (8th Cir. 1984) (commercial case; verdict for plaintiff; verdict reduced)

Fiorito Bros., Inc. v. Fruehauf Corp., 747 F.2d 1309 (9th Cir. 1984) (commercial claim; verdict for plaintiff; affirmed)

Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324 (10th Cir. 1984) (commercial claim; verdict for plaintiff; affirmed)

Martell v. Boardwalk Enterprises Inc., 748 F.2d 740 (2d Cir. 1984) (personal injury claim; verdict for plaintiff; verdict reduced)

Worthen Bank & Trust Co., N.A. v. Utley, 748 F.2d 1269 (8th Cir. 1984) (commercial claim; verdict for plaintiff reversed in part; verdict for defendant on counterclaim reversed)

O'Donnell v. Georgia Osteopathic Hospital, Inc., 748 F.2d 1543 (11th Cir. 1984) (discrimination claim; verdict for plaintiff; affirmed)

Romero v. National Rifle Association of America, Inc., 749 F.2d 77 (D.C. Cir. 1984) (personal injury claim;

verdict for defendant Lowe affirmed; verdict against defendant N.R.A. reversed)

Marino v. Ballestas, 749 F.2d 162 (3d Cir. 1984) (personal injury claim; verdict for defendant; reversed in part)

Stewart & Stevenson Services, Inc. v. Pickard, 749 F.2d 635 (11th Cir. 1984) (commercial claim; verdict for plaintiff; reversed in part)

Consolidated Cigar Co. v. Texas Commerce Bank, 749 F.2d 1169 (5th Cir. 1985) (commercial claim; verdict for plaintiff; reversed in part)

Toth v. Yoder, 749 F.2d 1190 (6th Cir. 1984) (personal injury claim; verdict for plaintiff; affirmed)

Tullos v. Resource Drilling, Inc., 750 F.2d 380 (5th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Shipp v. General Motors Corp., 750 F.2d 418 (5th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Preston v. Smith, 750 F.2d 530 (6th Cir. 1984) (constitutional claim; verdict for plaintiff; reversed)

Hatcock v. Edward D. Jones & Co., 750 F.2d 767 (9th Cir. 1984) (commercial claim; verdict for plaintiff; affirmed)

McKinnon v. City of Berwyn, 750 F.2d 1383 (7th Cir. 1984) (constitutional claim; verdict for plaintiff; verdict reduced)

LaMontagne v. American Convenience Products, Inc., 750 F.2d 1405 (7th Cir. 1984) (discrimination claim; verdict for plaintiff; reversed)

Pesaplastic, C.A. v. Cincinnati Milacron Co., 750 F.2d 1516 (11th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Trans-World Manufacturing Corp. v. Al Nyman & Sons, Inc., 750 F.2d 1552 (Fed. Cir. 1984) (commercial claim; verdict for defendant; reversed in part)

Cazzola v. Codman & Shurtleff, Inc., 751 F.2d 53 (1st Cir. 1984) (discrimination claim; verdict for plaintiff; affirmed)

Mackey v. Burke, 751 F.2d 322 (10th Cir. 1984) (commercial claim; verdict for plaintiff; verdict reduced)

Fisher v. First Stamford Bank and Trust Co., 751 F.2d 519 (2d Cir. 1984) (commercial claim; verdict for plaintiff; affirmed)

Young v. City of New Orleans, 751 F.2d 794 (5th Cir. 1985) (constitutional claim; liability verdict for plaintiff; damage amount, attacked by plaintiff; affirmed)

Tousley v. North American Van Lines, Inc., 752 F.2d 96 (4th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Conan Properties, Inc. v. Conans Pizza, Inc., 752 F.2d 145 (5th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Gonzalez v. Volvo of America Corp., 752 F.2d 295 (7th Cir. 1985) (personal injury claim; verdict for plaintiff; reversed)

Bonjorno v. Kaiser Aluminum & Chemical Corp., 752 F.2d 802 (3d Cir. 1984) (commercial claim; verdict for plaintiff; affirmed)

Vest v. Exxon Corp., 752 F.2d 959 (5th Cir. 1985) (commercial claim; verdict for plaintiff; reversed)

Wheeler v. Mental Health & Mental Retardation Authority of Harris County, Texas, 752 F.2d 1063 (5th Cir. 1985) (constitutional claim; verdict for plaintiff; reversed)

Armstrong v. Kansas City Southern Railway Company, 752 F.2d 1110 (5th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Smith v. Universal Underwriters Ins. Co., 752 F.2d 1535 (11th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Brocklesby v. United States, 753 F.2d 794 (9th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Vandenplas v. City of Muskego, 753 F.2d 555 (7th Cir. 1985) (constitutional claim; verdict for defendant; affirmed)

Pierce v. Ramsey Winch Co., 753 F.2d 416 (5th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

McSurely v. McClellan, 753 F.2d 88 (D.C. Cir. 1985) (constitutional claim; verdict for plaintiff; reversed in part)

Malcak v. Westchester Park District, 754 F.2d 239 (7th Cir. 1985); (constitutional claim; verdict for plaintiff; reversed)

Rymer v. Davis, 754 F.2d 198 (6th Cir. 1985) (constitutional claim; verdict for plaintiff; affirmed)

Rocco v. Johns-Manville Corp., 754 F.2d 110 (3d Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Pepsi-Cola Metro. Bottling Co., Inc. v. Checkers, Inc., 754 F.2d 10 (1st Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

DeFranco v. Valley Forge Ins. Co., 754 F.2d 293 (8th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Abeshouse v. Ultragraphics, Inc., 754 F.2d 467 (2d Cir. 1985) (commercial claim; verdict for plaintiff; verdict reduced)

Dixon v. International Harvester Co., 754 F.2d 573 (5th Cir. 1985) (personal injury claim; verdict for plaintiff; verdict reduced)

Moore v. Boating Industry Associations, 754 F.2d 698 (7th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed after remittitur)

U.C. Castings Co. v. Knight, 754 F.2d 1363 (7th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Kelly v. Allied Corp., 755 F.2d 184 (1st Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Eyre v. McDonough Power Equipment, Inc., 755 F.2d 416 (5th Cir. 1985) (personal injury claim; verdict for plaintiff; reversed)

Texoma AG-Products v. Hartford Accident and Indemnity Co., 755 F.2d 445 (5th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Davis v. West Community Hospital, 755 F.2d 455 (5th Cir. 1985) (constitutional claim; verdict for plaintiff; reversed in part)

Brown by Brown v. Syntex Laboratories, Inc., 755 F.2d 668 (8th Cir. 1985) (personal injury claim; verdict for plaintiff; reversed)

LeSavage v. White, 755 F.2d 814 (11th Cir. 1985) (constitutional claim; verdict for plaintiff; reversed in part)

Tibbs v. Great American Insurance Co., 755 F.2d 1370 (9th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Bright v. Firestone Tire & Rubber Co., 756 F.2d 19 (6th Cir. 1984) (personal injury claim; verdict for defendant; affirmed)

Federal Deposit Insurance Co. v. Hatmaker, 756 F.2d 34 (6th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Computer Identics Corp. v. Southern Pacific Co., 756 F.2d 200 (1st Cir. 1985) (commercial claim; verdict for defendant; affirmed)

Aldrich v. Thomson McKinnon Securities, Inc., 756 F.2d 243 (2d Cir. 1985) (commercial claim; verdict for plaintiff; verdict reduced)

Raftery v. Scott, 756 F.2d 335 (4th Cir. 1985) (miscellaneous claim; verdict for plaintiff; affirmed)

In re Corrugated Container Antitrust Litigation, 756 F.2d 411 (5th Cir. 1985) (commercial claim; verdict for defendant; affirmed)

W. B. Farms v. Fremont Nat. Bank & T. Co., 756 F.2d 663 (8th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Deakle v. John Graham & Sons, 756 F.2d 821 (11th Cir. 1985) (personal injury claim; verdict for plaintiff; verdict reduced)

Chedd-Angier Production v. Omni Publications Int., 756 F.2d 930 (1st Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Perry v. Stewart Title Co., 756 F.2d 1197 (5th Cir. 1985) (miscellaneous claim; verdict for plaintiff; reversed in part)

Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322 (8th Cir. 1985) (personal injury claim; verdict for plaintiff; evidence for punitive damages held sufficient but reversed and remanded for other errors)

Jamesbury Corp. v. Litton Industrial Products, Inc., 756 F.2d 1556 (Fed. Cir. 1985) (commercial claim; verdict for defendant; reversed)

Talliferro v. Augle, 757 F.2d 157 (7th Cir. 1985) (constitutional claim; verdict for plaintiff; verdict reduced)

Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1985) (constitutional claim; verdict for plaintiff; verdict reduced)

Air Et Chaleur, S.A. v. Janeway, 757 F.2d 489 (2d Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Emery-Waterhouse Co. v. Rhode Island Hosp. Trust Nat. Bank, 757 F.2d 399 (1st Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Laney v. Coleman Co., 758 F.2d 1299 (8th Cir. 1985) (personal injury claim; verdict for plaintiff; reversed in part)

Hull v. Merck & Co., Inc., 758 F.2d 1474 (11th Cir. 1985) (personal injury claim; verdict for defendant; affirmed)

Goldstein v. Manhattan Industries, Inc., 758 F.2d 1435 (11th Cir. 1985) (discrimination claim; verdict for plaintiff; affirmed)

Lavicky v. Burnett, 758 F.2d 468 (10th Cir. 1985) (constitutional claim; verdict for plaintiff; reversed in part)

Tavoulareas v. Piro, et al., 759 F.2d 90, on rehearing en banc 763 F.2d 1472 (D.C. Cir. 1985) (miscellaneous claim; verdict for plaintiff; reversed in part)

Mr. Chow of New York v. Ste. Jour Azur, S.A., 759 F.2d F.2d 219 (2d Cir. 1985) (miscellaneous claim; verdict for plaintiff; reversed)

U.S. Fire Insurance Co. v. Royal Insurance Co., 759 F.2d 306 (3d Cir. 1985) (commercial claim; verdict for plaintiff; reversed)

Ganey v. Edwards, 759 F.2d 337 (4th Cir. 1985) (constitutional claim; verdict for defendant; affirmed)

Molex, Inc. v. Nolen, 759 F.2d 474 (5th Cir. 1985) (miscellaneous claim; verdict for plaintiff; affirmed)

Walden v. United States Steel Corp., 759 F.2d 834 (11th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Bower v. O'Hara, 759 F.2d 1117 (3d Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Dobbs v. Gulf Oil Co., 759 F.2d 1213 (5th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Walters v. Minter International, 758 F.2d 73 (3d Cir. 1985) (personal injury claim; verdict for plaintiff; reversed in part)

T.D.S. Inc. v. Sheley Mutual Ins. Co., 760 F.2d 1520 (11th Cir. 1985) (commercial claim; verdict for plaintiff; verdict reduced)

Wagstaff v. Protective Apparel Corp. of America, 760 F.2d 1074 (10th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Chohus v. Cessna Aircraft Co., 760 F.2d 901 (8th Cir. 1985) (personal injury claim; verdict for defendant; affirmed)

Okeson v. Tolley School Dist No. 25, etc., 760 F.2d 864 (8th Cir. 1985) (constitutional claim; verdict for defendant; reversed)

Van Buskirk v. Carey Canadian Mines, Ltd., 760 F.2d 481 (3d Cir. 1985) (personal injury claim; verdict for plaintiff on liability affirmed; verdict for defendant on amount of damages affirmed)

Clarkson v. Orkin Exterminating Co., Inc., 761 F.2d 189 (4th Cir. 1985) (commercial claim; verdict for plaintiff; reversed in part)

Perry v. Stewart Title Co., 761 F.2d 237 (5th Cir. 1985) (miscellaneous claim; verdict for plaintiff; reversed)

Dabney v. Montgomery Ward & Co., Inc., 761 F.2d 494 (8th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Collier v. Hoisting and Portable Engineers, 761 F.2d 600 (10th Cir. 1985) (miscellaneous case; verdict for plaintiff; verdict reduced)

Northern Oil Co. v. Standard Oil Co. of California, 761 F.2d 699 (Emerg. Ct. App. 1985) (commercial case; verdict for plaintiff; reversed in part)

Vizbaras v. Prieber, 761 F.2d 1013 (4th Cir. 1985) (constitutional claim; verdict for defendant; affirmed)

Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129 (5th Cir. 1985) (personal injury claim; verdict for plaintiff; reversed in part)

Tice v. Lampert Yards, Inc., 761 F.2d 1210 (7th Cir. 1985) (discrimination claim; verdict for plaintiff; reversed)

Herold v. Burlington Northern, Inc., 761 F.2d 1241 (8th Cir. 1985) (personal injury claim; verdict for plaintiff; verdict reduced)

Cashman v. Allied Products Corp., 761 F.2d 1250 (8th Cir. 1985) (commercial claim; verdict for plaintiff; rev'd in part)

Phillips v. Hardware Wholesalers, Inc., 762 F.2d 46 (6th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Borough v. Duluth, Missabe & Iron Range R. Co., 762 F.2d 66 (8th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Martin v. Citibank, N.A., 762 F.2d 212 (2d Cir. 1985) (discrimination claim; verdict for plaintiff; reversed)

Thomas v. Booker, 762 F.2d 654 (8th Cir. 1985) (constitutional claim; verdict for plaintiff; reversed in part)

Purchal v. Patterson, 762 F.2d 713 (8th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Chalmers v. City of Los Angeles, 762 F.2d 753 (9th Cir. 1985) (constitutional claim; verdict for plaintiff; affirmed)

Redic v. Gary H. Watts Realty Co., 762 F.2d 1181 (4th Cir. 1985) (commercial claim; verdict for plaintiff; reversed in part)

Pregeant v. Pan American World Airways, Inc., 762 F.2d 1245 (5th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Stachura v. Truszkowski, 763 F.2d 211 (6th Cir. 1985) (constitutional claim; verdict for plaintiff; reversed in part)

Allen v. City of Kinloch, 763 F.2d 335 (8th Cir. 1985) (constitutional claim; verdict for plaintiff; reversed)

Powell v. Burns, 763 F.2d 337 (8th Cir. 1985) (personal injury claim; verdict for defendant; affirmed)

J.E.K. Industries Inc. v. Shoemaker, 763 F.2d 348 (8th Cir. 1985) (commercial claim; verdict for defendant; affirmed)

Rock v. McCoy, 763 F.2d 394 (10th Cir. 1985) (constitutional claim; verdict for plaintiff; affirmed)

Grogan v. General Maintenance Service Co., 763 F.2d 444 (D.C. Cir. 1985) (personal injury claim; verdict for defendant; affirmed)

Burten v. Milton Bradley Co., 763 F.2d 461 (1st Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Fishman v. Clancy, 763 F.2d 485 (1st Cir. 1985) (constitutional claim; verdict for plaintiff; affirmed)

Marler v. Dunn, 762 F.2d 968 (8th Cir. 1985) (personal injury claim; verdict for plaintiff; reversed)

Delta Rice Mill, Inc. v. General Foods Corp., 763 F.2d 1001 (8th Cir. 1985) (commercial claim; verdict for plaintiff; reversed in part)

Llaguno v. Mingey, 763 F.2d 1560 (7th Cir. 1984) (en banc) (constitutional claim; verdict for defendant; affirmed)

Park v. El Paso Board of Realtors, 764 F.2d 1053 (5th Cir. 1985) (commercial case; verdict for plaintiff; reversed in part)

In re Air Crash Disaster Near New Orleans, 764 F.2d 1085 (5th Cir. 1985) (personal injury claim; verdict for plaintiff; reversed in part)

Peacock v. J.C. Penney Co., Inc., 764 F.2d 1012 (4th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Pietronico v. Borough of Oceanport, 764 F.2d 976 (3d Cir. 1985) (discrimination claim; verdict for plaintiff; reversed)

Keiser v. Coliseum Properties, Inc., 764 F.2d 783 (11th Cir. 1985) (commercial claim; verdict for plaintiff; reversed)

Goffstein v. State Farm Fire and Cas. Co., 764 F.2d 522 (8th Cir. 1985) (commercial claim; verdict for defendant; affirmed)

Crawford v. Edmonson, 764 F.2d 479 (7th Cir. 1985) (constitutional claim; verdict for defendant; affirmed)

Delvaux v. Ford Motor Co., 764 F.2d 469 (7th Cir. 1985) (personal injury claim; verdict for defendant; affirmed)

Guttierrez v. Exxon Corp., 764 F.2d 399 (5th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Rogers v. Eagle Offshore Drilling Services, Inc., 764 F.2d 300 (5th Cir. 1985) (personal injury claim; verdict for defendant; affirmed)

West America Corp. v. Vaughan-Bassett Furniture, 765 F.2d 932 (9th Cir. 1985) (commercial claim; verdict for defendant; affirmed)

Japerson v. Purolator Courier Corp., 765 F.2d 736 (8th Cir. 1985) (miscellaneous claim; verdict for plaintiff; reduced verdict to $1.00)

Leonard v. Uniroyal, Inc., 765 F.2d 560 (6th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Dartez v. Fibreboard Corp., 765 F.2d 456 (5th Cir. 1985) (personal injury claim; verdict for plaintiff; reversed in part)

Stissy v. Interstate and Ocean Transport Co., 765 F.2d 370 (2d Cir. 1985) (personal injury claim; verdict for plaintiff; reversed in part)

Owens by Owens v. Bourns, Inc., 766 F.2d 145 (4th Cir. 1985) (personal injury claim; verdict for plaintiff; reversed)

Gutzan v. Altair Airlines, Inc., 766 F.2d 135 (3d Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Powell v. J. T. Posey Co., 766 F.2d 131 (3d Cir. 1985) (personal injury claim; verdict for plaintiff; reversed)

Spanish Action Comm. of Chicago v. City of Chicago, 766 F.2d 315 (7th Cir. 1985) (constitutional claim; verdict for defendant as to amount of damages; affirmed)

Cole v. Bertsch Vending Co., Inc., 766 F.2d 327 (7th Cir. 1985) (personal injury claim; verdict for defendant; reversed for new trial on evidentiary rulings otherwise aff'd)

Eisenberg v. Gagnon, 766 F.2d 770 (3d Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Maxfield v. Sinclair Intern., 766 F.2d 788 (3d Cir. 1985) (discrimination claim; verdict for plaintiff; affirmed)

Craft v. Metromedia, 766 F.2d 1205 (8th Cir. 1985) (miscellaneous claim; verdict for plaintiff; reversed)

Baas v. Hoye, 766 F.2d 1190 (8th Cir. 1985) (personal injury claim; verdict for plaintiff; reversed in part)

Minnesota Timber Producers v. American Mutual Insurance Co., 766 F.2d 1261 (8th Cir. 1985) (commercial claim; verdict for plaintiff; reversed in part)

Spence v. Mariehamns R/S, 766 F.2d 1504 (11th Cir. 1985) (personal injury claim; verdict for plaintiff; reversed)

Neubauer v. City of McAllen, Texas, 766 F.2d 1567 (5th Cir. 1985) (constitutional claim; verdict for plaintiff; reversed)

Springborn v. American Commercial Barge Lines, Inc., 767 F.2d 89 (5th Cir. 1985) (personal injury claims; verdict for plaintiff reduced; verdict for defendant affirmed)

Grandstaff v. City of Borger, Texas, 767 F.2d 161 (5th Cir. 1985) (constitutional claim; verdict for plaintiff; affirmed)

Baltezore v. Concordia Parish Sheriff's Dept., 767 F.2d 202 (5th Cir. 1985) (constitutional claim; verdict for plaintiff on 1 count; for defendant on others; affirmed)

Rhea v. Massey-Ferguson, Inc., 767 F.2d 266 (6th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Martin v. Joseph Harris Co., Inc., 767 F.2d 296 (6th Cir. 1985) (commercial claim; verdict for defendant; reversed)

Christensen v. Equitable Life Assurance Society of U.S., 767 F.2d 340 (7th Cir. 1985) (discrimination claim; verdict for plaintiff; reversed)

Goldsmith v. Diamond Shamrock Corp., 761 F.2d 411 (8th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed first verdict after retrial)

Ponderosa System, Inc. v. Brandt, 767 F.2d 668 (10th Cir. 1985) (commercial claim; verdict for defendant; affirmed)

Rocky Mountain Machinery v. First National Bank, 767 F.2d 722 (10th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Echlange-Schoeningen v. Parrish, 767 F.2d 788 (11th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 167 F.2d 1498 (11th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Brocklesby v. United States, 767 F.2d 1288 (9th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Michaels v. Michaels, 767 F.2d 1185 (7th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

In re Air Crash Disaster Near New Orleans, La., 767 F.2d 1151 (5th Cir. 1985) (personal injury claim; verdict for plaintiff reduced; reversed in part)

Bodzin v. City of Dallas, 768 F.2d 722 (5th Cir. 1985) (constitutional claim; verdict for defendant; affirmed)

Dallas v. Aetna Life Ins. Co., 768 F.2d 1303 (11th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Woods v. Burlington Northern Railroad Co., 768 F.2d 1287 (11th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001 (9th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Morris v. Spratt, 768 F.2d 879 (7th Cir. 1985) (personal injury claim; verdict for defendant; affirmed)

Warren v. Illinois Central Gulf Railroad Co., 768 F.2d 709 (5th Cir. 1985) (personal injury claim; verdict for defendant; affirmed)

Munguia v. Chevron Co., U.S.A., 768 F.2d 649 (5th Cir. 1985) (personal injury claim; verdict for plaintiff; reversed)

Garcia v. Salt Lake County, 768 F.2d 303 (10th Cir. 1985) (constitutional claim; verdict for plaintiff; affirmed)

Stoetzel v. Continental Textile Corp. of America, 768 F.2d 217 (8th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Vippolis v. Village of Haverstraw, 768 F.2d 40 (2d Cir. 1985) (constitutional claim; verdict for plaintiff; reversed)

Strobl v. N. Y. Mercantile Exchange, 768 F.2d 22 (2d Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Stacey v. Allied Stores Corp., 768 F.2d 402 (D.C. Cir. 1985) (discrimination claim; verdict for plaintiff; affirmed)

Sprague v. Boston and Maine Corp., 769 F.2d 26 (1st Cir. 1985) (personal injury claim; verdict for plaintiff on plaintiff's claim reversed in part; verdict for defendant on counterclaim affirmed)

Western Plains Service Corp. v. Ponderosa Development Corp., 769 F.2d 654 (10th Cir. 1985) (commercial claim; verdict for defendant; reversed)

Seidenstein v. National Medical Enterprises, 769 F.2d 1100 (5th Cir. 1985) (commercial claim; verdict for plaintiff; reversed)

Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985) (miscellaneous claim; verdict for plaintiff; verdict reduced)

Hibna v. Odegaard, 769 F.2d 1147 (7th Cir. 1985) (constitutional claim; verdict for plaintiff; affirmed)

Williams v. Caterpillar Tractor Co., 770 F.2d 47 (6th Cir. 1985) (discrimination claim; verdict for plaintiff; affirmed)

Gilkerson v. Toastmasters, Inc., 770 F.2d 133 (8th Cir. 1985) (discrimination claim; verdict for plaintiff; reversed in part)

Ratner v. Sioux Natural Gas Corp., 770 F.2d 512 (5th Cir. 1985) (commercial claim; verdict for plaintiff; reversed)

Smith v. Monsanto Chemical Co., 770 F.2d 719 (8th Cir. 1985) (discrimination claim; verdict for plaintiff; reversed)

Bristow v. Daily Press, Inc., 770 F.2d 1251 (4th Cir. 1985) (discrimination claim; verdict for plaintiff; reversed)

McDaniel v. Temple Independent School District, 770 F.2d 1340 (5th Cir. 1985) (discrimination claim; verdict for defendant; affirmed)

Yopp v. Siegel Trading Co., Inc., 770 F.2d 1461 (9th Cir. 1985) (commercial claim; verdict for plaintiff; reversed)

Electro-Miniatures Corp. v. Wendon Co., Inc., 771 F.2d 23 (2d Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Rorex v. Traynor, 771 F.2d 383 (8th Cir. 1985) (miscellaneous claim; verdict for plaintiff; reversed in part)

Wildman v. Lerner Stores Corp., 771 F.2d 605 (1st Cir. 1985) (discrimination claim; verdict for plaintiff; affirmed)

Plante v. Hobart Corp., 771 F.2d 617 (1st Cir. 1985) (personal inury claim; verdict for plaintiff; reversed)

Gray v. Manitowoc Co., Inc., 771 F.2d 866 (5th Cir. 1985) (personal injury claim; verdict for plaintiff; reversed)

Joan W. v. City of Chicago, 771 F.2d 1020 (7th Cir. 1985) (constitutional claim; verdict for plaintiff; verdict reduced)

J. Yanan & Associates v. Integrity Insurance Co., 771 F.2d 1025 (7th Cir. 1985) (commercial claim; verdict for plaintiff; reversed)

General Foods Corp. v. Valley Lea Dairies, 771 F.2d 1093 (7th Cir. 1985) (commercial claim; verdict for defendants; affirmed)

Holley v. Sanyo Manufacturing Inc., 771 F.2d 1161 (8th Cir. 1985) (discrimination claim; verdict for plaintiff; reversed)

Johnson v. Matlock, 771 F.2d 1432 (10th Cir. 1985) (personal injury claim; verdict for defendant; affirmed)

Smith v. Transworld Drilling Co., 772 F.2d 157 (5th Cir. 1985) (personal injury claim; verdict for defendant; reversed in part)

Bacon v. Patera, 772 F.2d 259 (6th Cir. 1985) (constitutional claim; verdict for plaintiff; reversed in part)

Murphy v. Cincinnati Insurance Co., 772 F.2d 273 (6th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250 (6th Cir. 1985) (discrimination claim; verdict for plaintiff; reduced)

Ramsel v. American Aid Filter Co., Inc., 772 F.2d 1303 (7th Cir. 1985) (discrimination claim; verdict for plaintiff; affirmed)

Twin Disc Inc. v. Big Bud Tractor, Inc., 772 F.2d 1329 (7th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Gumz v. Morrissette, 772 F.2d 1395 (7th Cir. 1985) (constitutional claim; verdict for plaintiff; reversed)

Cincinnati Fluid Power, Inc. v. Rexnord, Inc., 773 F.2d 92 (6th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Hollins v. Powell, 773 F.2d 191 (8th Cir. 1985) (constitutional claim; verdict for plaintiff; verdict reduced)

Smith v. Transworld Drilling Co., 773 F.2d 610 (5th Cir. 1985) (personal injury claim; verdict of first jury for plaintiff reversed; verdict of second jury for defendant affirmed)

Reed v. General Motors Corp., 773 F.2d 660 (5th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed sufficiency but reversed for evidentiary rulings)

Roberts v. City of Troy, 773 F.2d 720 (6th Cir. 1985) (constitutional claim; verdict for defendant; affirmed)

Lancaster v. Norfolk & Western Railway Co., 773 F.2d 807 (7th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Madison County Jail Inmates v. Thompson, 773 F.2d 834 (7th Cir. 1985) (constitutional claim; verdict for plaintiff; verdict reduced)

Nebraska Public Power District v. Austin Power, Inc., 773 F.2d 960 (8th Cir. 1985) (commercial claim; verdict in favor of plaintiff's claim affirmed; verdict in favor of defendant's counterclaim affirmed)

Robins v. Harum, 773 F.2d 1004 (9th Cir. 1985) (constitutional claim; verdict for plaintiff; affirmed)

Klein v. Sears, Roebuck & Co., 773 F.2d 1421 (4th Cir. 1985) (personal injury claim; verdict for plaintiff; reversed in part)

Bone v. Refco, Inc., 774 F.2d 235 (8th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)